Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

EDWARD BRODNICKI,

Petitioner,

vs.

CITY OF OMAHA, NEBRASKA, a Municipal Corporation, COUNTY OF DOUGLAS, a Nebraska Political Subdivision, PATRICK A. McCASLIN, KEVIN DONLAN, JEFFERY J. THEULEN, JOHN SKANES, JOHN SWANSON, MICHAEL HOCH, and JAMES JANSEN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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107 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHEN DOES AN IDENTIFICATION PROCEDURE VIOLATE DUE PROCESS UNDER THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS?

QUESTION:

Is there a constitutional violation of substantive or procedural due process during an unduly suggestive "Showup" identification procedure that provides the basis for the arrest of a suspect when

1. The suspect is never brought to trial?

2. A municipality fails to train, or improperly trains, its police officers regarding suspect (showup) identification, investigation and interrogation, of a child victim/witness?

3. A municipality either adopts standard operating procedures for its police officers that are vague and incomplete or does not adopt standard operating procedures which protect the constitutional rights of its citizenry?

II. WHEN DO THE ACTS OR ACTIONS OF A COUNTY ATTORNEY FALL OUTSIDE THE ROLE OF ADVOCATE FOR THE STATE DISQUALIFYING THE PROTECTION OF ABSOLUTE IMMUNITY?

QUESTION:

When a county attorney, who is not the assigned trial attorney, undertakes to review a case for dismissal or causes an investigation to be made once charges are initiated, is it a necessary consequence that every such undertaking falls within the role of advocate for the State?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Edward Brodnicki, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on January 31, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit has not been reported. It is reprinted in the Appendix hereto, p. App. 1.

The Memorandum Opinions and Orders of the United States District Court for the District of Nebraska has not been reported. They are reprinted in the Appendix hereto, pp. App. 16, 18, 29.

JURISDICTIONAL STATEMENT

Invoking federal jurisdiction under 42 U.S.C. § 1983, the Petitioner brought this suit in the United States District Court for the District of Nebraska. On June 13, 1994, the District of Nebraska entered a judgment of dismissal for defendants Douglas County and James Jansen. On January 25, 1995, the District of Nebraska entered a judgment of dismissal for defendants McCaslin, Donlan, Theulen, Swanson, and Hoch. On February 24, 1995, the District of Nebraska entered a judgment of dismissal for defendant City of Omaha. See. p. App-16, 18, 29, *infra*.

On Petitioner's appeal, the Eighth Circuit Court of Appeals, on January 31, 1996, entered an opinion affirming the District of Nebraska's Judgments of Dismissal. See p. App. 1, *infra*.

On February 14, 1996, the Court of Appeals granted an extension of time for filing Petition for Rehearing to February 28, 1996.

On March 25, 1996, the Court of Appeals entered an Order denying Petition for Rehearing and Rehearing En Banc. See p. App. 56, *infra*.

On June 14, 1996, Justice Thomas ordered that the time for filing this Petition for Writ of Certiorari be extended to and including July 23, 1996.

The jurisdiction of this Court to review the judgment of the Eighth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

On March 17, 1992, Mr. Brodnicki was arrested for attempted kidnapping of a child. A complaint and information were subsequently filed by the Douglas County Attorney's office alleging that:

> . . . on or about the 17th day of March, 1992, Edward C. Brodnicki . . . did then and there attempt to abduct Meaghan P. Callaghan and restrain Meaghan P. Callaghan with the intent to hold Meaghan P. Callaghan for ransom or reward, or use Meaghan P. Callaghan as a shield or hostage, or terrorize Meaghan P. Callaghan or a third person, or to commit a felony, ...

On December 11, 1992, after a review of the evidence and determining that there was insufficient evidence, Deputy County Attorney Linda Senff made an oral motion to dismiss the charge against Mr. Brodnicki.

On March 16, 1993, Mr. Brodnicki filed a civil rights action against the Respondents, in the United States District Court for the District of Nebraska, alleging that the acts of the Respondents constituted a deprivation of Mr. Brodnicki's liberty without due process of law, the acts of the Respondents with respect to the initial arrest and detention of Mr. Brodnicki constituted false arrest and false imprisonment, that the acts of the Respondents constituted malicious prosecution and that the acts of the Respondents constituted negligent infliction of emotional distress, all in violation of Mr. Brodnicki's civil rights afforded him pursuant to 42 U.S.C. § 1983 and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

On October 5, 1993, the Respondents Jansen and County of Douglas filed a motion for summary judgment asserting that Respondent Jansen enjoys prosecutorial immunity and that Jansen's conduct was not pursuant to policies and practices approved by the Douglas County Commissioner or other superior officers.

On June 13, 1994 the District Court granted Respondents Jansen and County of Douglas's motion.

On July 12, 1994 Respondents McCaslin, Donlan, Theulen, Skanes, Swanson and Hoch filed a motion for summary judgment stating there was no genuine issue as

to any material fact regarding whether these Respondents' conduct violated any clearly established constitutional rights of Mr. Brodnicki. On January 26, 1995 the District Court granted these Respondents' motion and dismissed Mr. Brodnicki's complaint to the Respondent officers.

A motion for summary judgment was again filed by the Respondent officers on January 17, 1995 and said motion included the Respondent City of Omaha. On February 24, 1995 the District Court granted summary judgment for the City of Omaha and dismissed the case.

Mr. Brodnicki appealed the summary judgment decisions to the Eighth Circuit where it was briefed and argued. On January 31, 1996, the Eighth Circuit entered an Order affirming the grant of summary judgment.

On Application to the Eighth Circuit Court of appeals, Mr. Brodnicki was granted an extension of time for filing a petition for rehearing to February 28, 1996.

On March 25, 1996, the Eighth Circuit entered an Order denying Petition for Rehearing and Suggestion for Rehearing En Banc.

The issues throughout these lower court proceedings related to three questions: First, the identification procedure implemented by the police officers; Second, the training and policies, or lack thereof, adopted by the City regarding identification procedure; and Third, the scope of the actions undertaken by the County Attorney.

REASONS FOR GRANTING WRIT

I. THE CONSTITUTIONAL QUESTION OF DUE PROCESS

This Court should grant the Petition for a Writ of Certiorari in this case for the following reasons:

A. There is currently no "bright line rule" as to if an unduly suggestive "showup" identification procedure which provides the grounds for an individual's arrest violates a person's substantive Due Process rights when that individual is never brought to trial, and to avoid the potential for constitutional abuse in the future there should be.

B. Because of the greater threat to protected liberty interests, municipalities must be required to adopt and institute policies and training procedures for their law enforcement departments which provide its citizens additional safeguards when dealing with child victim/witnesses.

C. As a matter of public policy and constitutional law, the policies of a municipality's law enforcement department's should not be vague or incomplete when application of the policies will result in violations of protected constitutional rights.

1. DUE PROCESS IS VIOLATED EVEN ABSENT A TRIAL

This Court has held that a person's due process rights are not violated when an improper showup is conducted and the case never goes to trial. The Court's discussion of Due Process in the various holdings are in reference to procedural due process. The Court has also held that innocent persons are not guaranteed from

arrest. Both are fallacious when considered in light of this case.

The City adopted and instituted vague and outdated policies which were then applied and enforced by untrained officers. Equally important is the factor of the inherent and unnecessarily suggestive aspect of the showup. The result of the application of the above elements was the arrest of an innocent person and the violation of his Substantive Due Process rights.

The right of individuals to due process when life, liberty or property is to be taken is made applicable to the states by the Fourteenth Amendment. The intent was to secure the right of persons to be free from wrongful incarceration by the states. This cannot be denied. Due Process however, is separated into two elements: Procedural and Substantive.

The basic premise behind procedural due process is that a deprivation of life, liberty or property must have first occurred which then entitles the person affected to be notified and heard on the issues. This premise is the thrust behind the holdings which state that if the case doesn't go to trial, there is no violation of due process. Here, Brodnicki was arrested which implicated a liberty interest. He was notified of all proceedings and was heard at said proceedings. Procedural Due Process may have been satisfied, but, there are two elements of due process. The substantive element of due process requires that laws and governmental policies be enforced fairly and reasonably, in content as well as application. The essence of substantive due process is protection from arbitrary and unreasonable action by the state.

It cannot be said that adoption of vague and outdated procedures is reasonable as applied to constitutionally protected interests. The application of those procedures by inadequately trained law enforcement officers is necessarily arbitrary, i.e., without adequate determining principle. The unreasonable adoption and arbitrary application of the policies and procedures of the City of Omaha and its police department clearly implicate the substantive element of Due Process.

Brodnicki was arrested, not because he had done anything wrong, but because the City had not trained its officers properly in application of its procedures and policies and in the sensitive areas of identification, interrogation and investigation of accusations brought by child victim/witnesses. On the constitutional level, Brodnicki's liberty interest was violated by this wrongful action and this Court should not trivialize the violation by addressing only the procedural element of due process. If the Fourth and Fourteenth Amendments mean anything, it is that this kind of action by the City and its agents will not be allowed and condoned in this society.

Continued acquiescence by the Court in this kind of behavior by the City and its police officers threatens every innocent person, not just in Omaha, but in every city with policies and procedures and training methods similar to Omaha's. That is, and should remain, unacceptable.

2. ADDITIONAL SAFEGUARDS

This Court has determined that showup procedures are inherently suggestive, however, case law has set forth

several factors for safeguarding the rights of suspects. It is also quite clear from a reading of the case law that the factor of age is not given its due weight. This is especially true when the purported victim or witness is a child, not necessarily in the legal sense of being under the age of majority, but in the sense that a child of tender years does not possess the necessary cognitive abilities required to satisfy the test set forth in case law for curing the misidentification of suspects. The Court should now require that law enforcement be specifically trained in procedures for identification, interrogation, and investigation when the victim/witness is a child of tender years.

This is not a case which should be based solely on the issue of probable cause. This case is about untrained or poorly trained officers hearing the account of a young alleged victim and blindly believing the child's story as true in the face of clear and contradictory facts.

This is a case about a city that adopted policies and procedures for its police department that did not effectively train its officers in applying those policies and procedures which in turn result in the egregious violation of Ed Brodnicki's constitutional rights.

Upon initial contact with the alleged victim, the police officers simply took down the statements made by her and set about finding a suspect. She had given the officers a license plate number and the officers determined the owner to be Brodnicki. That is the only fact given the officers that was determined consistent with her statement.

The description given by the alleged victim was not even close to the actual features and body structure of the

alleged suspect. The items recovered from Brodnicki's automobile did not match the description given by the alleged victim. The alleged incident had occurred less than thirty minutes prior with Brodnicki attempting to lure the alleged victim into his car yet, the car was cool to the officer's touch. There were obvious inconsistencies in her stories initially and at the police station. But the officers never questioned the inconsistencies. Instead, they drove the alleged victim and her father to Brodnicki's home. Brodnicki was standing in his yard with another officer when the alleged victim identified him as the perpetrator. Based upon the "positive" identification and the "consistent" accounting by the alleged victim, Brodnicki was wrongfully arrested and charged.

At a minimum, the actions of the officers violated the policies and procedures adopted and instituted by the City of Omaha. These policies and procedures qualify under 42 U.S.C. § 1983 as state action and the City should be held liable for failing to properly train its officers.

The City's policy for showups is undeniably vague and outdated. The only concern set forth in the policy is that the time between the alleged act and the identification not be too great. The policy required probable cause to be established before the return of the suspect, but the officer's stated that probable cause existed only after the alleged victim's identification of Brodnicki. These officers were not properly trained as to the proper constitutional method for identification and it resulted in the arrest of an innocent man.

In order to prevent the likelihood of this event ever occurring again, law enforcement officers should be specially trained in dealing with child victims. Legal scholars and psychological literature agree that, when a child is faced with a situation similar to the one Brodnicki's accuser faced, the probability for misidentification is greatly increased. In this case, the showup procedure was not the accepted or appropriate method for identification. To protect the rights of innocent persons, where there is no threat of flight or danger to the community, the appropriate method of identification is the lineup. This the Court has long supported. The showup is to be used only in "emergency" type situations as evidenced by case law. There was no threat that Brodnicki was a risk of flight or a risk to others. Because the City of Omaha failed to train its officers properly it became inevitable that, at some point, an innocent person would be wrongfully accused, identified and arrested thereby violating his Due Process rights.

This area should be no less restrictive than the standard used for obtaining a search warrant. Regarding the search warrant, the affiant, usually a police officer, cannot blindly rely on information given from an informant that he knows to be false or is not verified. The officer must make a further investigation to verify the information and show the veracity of the informant. The standard to be applied in the case of improper training should be the same. Here the officers had conflicting descriptions and facts. Unless and until those facts are at a minimum investigated, there should be no grounds to arrest. To do so is clearly a violation of Due Process.

The Court should adopt a standard for identification procedure that clearly and unequivocally requires that cities train law enforcement officers in identification, interrogation and investigation techniques which specifically address the volatile problems present or inherent when dealing with children of tender years.

3. VAGUE AND ANTIQUATED POLICIES

It is a maxim of American justice that it is better to allow ten guilty people to go free that to convict one innocent person. The force of the maxim should equally apply to arrests based on vague policies.

Because criminal law and constitutional law are so intertwined, it is unconscionable for a city to enforce policies which cannot be fairly administered against a suspect. In this case, the showup policy of the City of Omaha Police Department was last updated in January of 1977. The landmark case of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), clearly put the city on notice that its policies subjected it to suit under 42 U.S.C. § 1983.

The policy in question, OPS 3-1-1, states there is only one "legally" important factor to consider in determining whether to conduct a showup – Time. Time is not the only consideration or factor. The policy itself refers to another factor – "When this return becomes necessary, . . . " – which in turn raises several other considerations an officer needs to take into account before concerning himself with a time factor. The "necessary" element is never discussed within the policy, at all, lending itself to several interpretations all of which will be considered only with

the "time" factor, without consideration of other important due process protections.

The adoption by the City of Omaha of this and other policies requires the city to revise and update policies for the protection of its citizenry. Similarly, the city must be required to have policies which, in application, threaten protected constitutional liberty interests set forth in such detail that a reasonable police officer enforcing the law will be able to determine if his or her actions are violating the rights of the suspect. The City cannot be allowed to hide behind its policies just because the policies are in place. The application of vague and antiquated policies will inevitably result in violations of constitutional rights as is evidenced in this matter.

Here, the City has not properly trained its officers and expects its officers to apply and enforce, poorly drafted and outdated policies and procedures. This Court has long held that such actions are not acceptable and violate Due Process.

II. THE ROLES OF THE COUNTY ATTORNEY

This Court should grant the Petition for Certiorari for the following additional reasons:

A. Once charges are initiated against a suspect, there is currently no "bright line rule" as to when the County Attorney is acting in the role as advocate for the State and thus cloaked with absolute immunity and when he is acting in the role of investigator or administrator thereby being afforded the protection of qualified immunity, and to avoid the potential for future constitutional abuse the Court should adopt such a rule.

1. NO BRIGHT LINE RULE

This Court has not distinguished between the prosecutor's roles of advocate for the state and the roles of administrator and investigator and it is necessary to do so. Continuing to allow prosecutors, particularly elected County Attorneys, to hide behind the veil of absolute immunity for every function of their office as acting as advocate for the state in prosecutions is fallacious and creates a very real threat for constitutional abuses.

This Court has held that prosecutors are immune from civil suits for damages under § 1983 when initiating a prosecution and presenting the State's case in order to eliminate the threat of undermining the prosecutor's performance.

It is now time for the Court to establish a framework, a bright line rule, within which an elected official may avail himself of absolute immunity and is otherwise cloaked only with qualified immunity.

In this case, Jansen is the duly elected County Attorney for Douglas County, Nebraska. In his role as County Attorney, Jansen may wear many hats in the performance

of his office. However, it is not a necessary consequence that every action taken by him on a case being prosecuted by the State is within the role of advocate for the State. As the duly elected County Attorney, Jansen is responsible for the administration of the Office. Regarding this duty, his review of a case may be purely administrative, i.e., relating to time and costs. Similarly, investigation of matters can fall outside the role of advocate for the State.

This Court has adopted a "functional analysis". This approach looks to the nature of the function performed and not only to the identity of the actor who performed it. The two elements are not totally inseparable as evidenced in this case. Jansen was not the "prosecutor" in this case. Two Assistant County Attorneys prosecuted this case for the State. Jansen's role in delegating the responsibility of prosecution to the assistant attorneys falls within the role of administrator. Additionally, not every review of this case can be separated into the category of advocate. Even though Jansen reviewed polygraph reports and had meetings with Brodnicki's defense counsel, Jansen's role may have been purely administrative availing him of only qualified immunity. The two assistant attorneys are clearly cloaked with absolute immunity, the same cannot be said for Jansen. Although the "functional analysis" test adopted by this Court is workable as to the actual prosecutors in a given case, the test is not dispositive on the issue presented to this Court regarding the role of the elected County Attorney.

The lower courts held that every aspect was as advocate for the State without properly considering Jansen's primary role as an elected official. The waters are too

muddy for a definitive ruling that he was acting as advocate in every aspect of Brodnicki's case. The primary role is administrative. Jansen runs the office. This role is no different than the mayor's office or the Office of the President, both administrative.

Continuing to accept the functional analysis test as dispositive will undoubtedly lead to abuse of office. This may not happen in every case, but it should not be discarded as unrealistic. This Court should not bury its head in the sand and conclude that prosecutors, or elected officials, would never engage in unethical or illegal conduct because of a blanket protection. Another time honored maxim states that power corrupts and absolute power corrupts absolutely. When the lower courts determine that Jansen acted as an advocate for the State simply based upon the function that he performed without consideration of his true role, they have opened the door for abuses which inevitably will result in the violation of constitutional rights, as happened to Brodnicki.

In order to sustain the confidence of the public in its law enforcement offices, it is important for this Court to establish such a rule as will define the limits of a duly elected County Attorney to prevent unlawful and malicious prosecutions of innocent persons.

CONCLUSION

It is respectfully submitted that for important reasons of constitutional law and public policy, this Court should grant the Petitioner's request for a Writ of Certiorari. Left unresolved, these important and difficult issues will

undermine the confidence of the public in the legal system and its law enforcement.

By adopting and articulating rules designed to further protect liberty interests and a bright line rule for the role of the elected County Attorney, this Court will reinforce the trust and confidence necessary to maintain an effective judicial system, especially on the local level.

It is the Supreme Court and not the cities and counties or police which are the guardians and interpreters of our constitutional interests. Liberty means nothing lest this Court zealously guard those interests and not allow their derogation by untrained police officers vague, outdated policies.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1785

Edward Brodnicki, Appellant, v. City of Omaha, Nebraska, a Municipal Corporation; County of Douglas, a Nebraska Political Subdivision; Patrick A. McCaslin; Kevin Donlan; Jeffery J. Theulen; John Skanes; Michael Hoch; James Jansen; John Swanson, Appellees.	* * * * * * * * * * * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska.

Submitted: October 18, 1995

Filed: January 31, 1996

Before BOWMAN, FLOYD R. GIBSON, and WOLLMAN, Circuit Judges.

BOWMAN, Circuit Judge.

Edward Brodnicki appeals the adverse grant of summary judgment by the District Court[1] in Brodnicki's 42 U.S.C. § 1983 action against the City of Omaha, Douglas County, members of the Omaha Police Department, and the county attorney, James Jansen. We affirm.

This case began when a nine-year-old girl, Meaghan Callaghan, reported to Omaha police that she had been approached and followed by a man who tried to coax her into his car. She stated that the man had dirty-blonde hair, a moustache, wore sunglasses, a black hat and black shirt, and drove a white car with license plate number 1-AA864. Callaghan reported that the man opened his car door and said, "Your mother's going to be late at work, and she told me to pick you up." Callaghan stated that although she refused to get into the car with the man, he continued to follow her for two blocks, repeating his request for her to accompany him. The police traced the license plate number to Brodnicki's car.

Police brought Callaghan and her father to Brodnicki's home, where she identified Brodnicki's car as the one that followed her. After obtaining Brodnicki's consent, police arranged for a "showup,"[2] with Brodnicki standing in his front yard so that Callaghan could

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[1] The Honorable Lyle E. Strom, United States District Judge for the District of Nebraska.

[2] A "showup" is a procedure where a single individual is exhibited to a witness and the witness is asked whether she can identify the individual as the perpetrator of the crime being investigated.

observe him from the police cruiser. The officers cautioned Callaghan about the serious nature of her allegations and the importance of accuracy. Callaghan positively identified Brodnicki as the driver of the car that had followed her.

Next, the officers obtained Brodnicki's consent to search his car where they found sunglasses, a baseball cap similar to the one described by Callaghan, and a stocking cap. Subsequently, Brodnicki was taken to police headquarters for questioning. He explained that he was at home alone on the afternoon in question; he did not provide the name of any person who could verify his whereabouts. He was given an opportunity to confront Callaghan, but he declined. The officers concluded there was sufficient evidence to arrest Brodnicki and to charge him with attempted kidnapping. A preliminary hearing was held in which Brodnicki cross-examined the state's witnesses, and he was provided the opportunity to present evidence, but he declined. Brodnicki was bound over for trial and released on bond. Soon thereafter, Brodnicki hired his own investigators, who concluded that he was at home during the alleged incident and did not drive his car during the relevant time period. The investigators also interviewed children with whom Callaghan had played on the day of the alleged incident. One child stated that she followed Callaghan home, but never saw Brodnicki approach Callaghan. After confirming this information, the county attorney's office dismissed the charges against Brodnicki.

Brodnicki then brought this § 1983 action, claiming that he was arrested without probable cause and that the arrest was pursuant to a policy or practice of the City of

Omaha. Brodnicki also claimed that Jansen violated his due process rights by prosecuting him for attempted kidnapping and that Jansen's actions were taken pursuant to the policies and practices of Douglas County. Defendants Jansen and Douglas County moved for summary judgment arguing, *inter alia*, that Jansen, as county attorney, was entitled to absolute immunity for his actions in connection with the charges against Brodnicki and that Jansen's conduct was not pursuant to policies and practices approved by Douglas County. The District Court granted summary judgment to Jansen and Douglas County, concluding that Jansen was entitled to absolute immunity and that there was no basis for finding Douglas County liable. The police officers also filed a motion for summary judgment, claiming that they were entitled to qualified immunity. Before the District Court ruled on that motion, the officers and the City moved for summary judgment on the merits. The District Court did not address the officers' qualified immunity defense, but instead granted summary judgment on the merits in favor of the officers and the City. The District Court held that the officers had probable cause to arrest Brodnicki, and, since the officers' actions were proper, there was no basis for holding the City liable under a theory of inadequate training or municipal custom.

Brodnicki timely appeals.[3] He argues that as a matter of law (1) the police officers violated his Fourth Amendment rights by arresting him without probable cause; (2)

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[3] On June 8, 1995, Brodnicki filed a motion to supplement the record. His motion was ordered taken with the case. Brodnicki's motion to supplement the record is granted.

the officers acted pursuant to policies and practices approved by the City of Omaha; and (3) Jansen violated Brodnicki's due process rights by prosecuting him for attempted kidnapping.[4]

I.

We review *de novo* the decision to grant a summary judgment motion. *Maitland v. University of Minn.*, 43 F.3d 357, 360 (8th Cir. 1994). We will affirm the judgment if the record shows that there is no genuine issue of material fact and that the prevailing party is entitled to judgment as a matter of law. *Id.; see also* Fed. R. Civ. P. 56(c).

II.

Brodnicki argues that the facts, as to which there are no material disputes, show that the Omaha police officers did not have probable cause for his arrest, which therefore violated his rights under the Fourth Amendment made applicable to the states through the Fourteenth Amendment's Due Process clause. *See Baker v. McCollan*, 443 U.S. 137, 142 (1979); *Hannah v. City of Overland*, 795 F.2d 1385, 1389 (8th Cir. 1986) (holding § 1983 action lies for warrantless arrest without probable cause). Probable cause exists if "the totality of facts based on reasonably trustworthy information would justify a prudent person in believing the individual arrested had committed . . . an offense" at the time of the arrest. *Hannah*, 795 F.2d at 1389

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[4] Because Brodnicki does not challenge the District Court's decision granting summary judgment in favor of Douglas County, that ruling is not before us.

(quoting *United States v. Wallraff*, 705 F.2d 980, 990 (8th Cir. 1983). "[T]he probability, and not a prima facie showing, of criminal activity is the standard of probable cause." *Id.* (quoting *Wallraff*, 705 F.2d at 990) (internal quotations omitted)).

Brodnicki makes several arguments as to why, in his view, his arrest lacked probable cause. First, he argues that the police were not justified in believing Callaghan's story when confronted with his denial of the alleged incident, and that the police had a duty to investigate his alibi before making their probable cause determination. We disagree. The officers were not required to conduct a mini-trial before arresting Brodnicki. *Morrison v. United States*, 491 F.2d 344, 346 (8th Cir. 1974). Probable cause is to be determined upon the objective facts available to the officers at the time of the arrest. *Id.* Moreover, the officers' reliance on Callaghan's story of her near-abduction was not objectively unreasonable. Callaghan appeared to be a credible witness. She gave the police a specific description of the car, its license plate number, and a detailed account of the incident. This information led the police to identify Brodnicki's car, which matched Callaghan's description. Brodnicki's car then was found in the immediate vicinity where, according to Callaghan, she was accosted while on her way home after playing with her friends. Callaghan's mother made statements to the officers attesting to her daughter's truthfulness. Callaghan identified Brodnicki in a showup. Upon this evidence, a reasonable police officer could conclude that probable cause existed to arrest Brodnicki.

Brodnicki correctly asserts that his physical appearance is somewhat inconsistent with Callaghan's description of the man who allegedly attempted to lure her into his car. For example, Brodnicki is six feet two inches tall and 280 pounds with dark brown hair as opposed to five feet eleven inches tall and 220 pounds with dirty-blonde hair; Brodnicki has a beard but no mustache; he was dressed in a brown shirt rather than a black shirt. Brodnicki argues that such inconsistencies vitiate probable cause. We disagree. The evaluation of evidence to determine if probable cause exists is not an exact science. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (defining probable cause as a practical, nontechnical concept that strikes a balance between society's interest in effective law enforcement and protection of law-abiding citizens). We must consider the inconsistencies that Brodnicki points out in light of all of the circumstances of which the arresting officers were aware at the time of his arrest, including Callaghan's tender age. Having done so, we conclude that these inconsistencies are not sufficient to defeat a finding of probable cause.

Brodnicki next argues that the showup at his house was so suggestive that it was improper to include it in the probable cause evaluation. Brodnicki further argues that without Callaghan's identification of him at the showup the police lacked probable cause for his arrest. We are not persuaded. Even if we exclude the showup from our probable cause analysis, what remains are police officers who reasonably believed that they were dealing with a credible victim-witness. They acted on a specific, detailed account of events that led them to Brodnicki's car, and to Brodnicki, who fit the nine-year-old's description of her

near abductor fairly well. At the time of Brodnicki's arrest, the police had no reason to suspect that Callaghan may have been fabricating her story. Indeed, Callaghan's mother vouched to the officers for their daughter's truthfulness and good character. Any objective reasons for skepticism about Callaghan's allegations emerged only after Brodnicki's arrest.[5]

Nonetheless, we find no need to exclude the showup from our probable cause analysis, for we conclude that the showup was conducted in a constitutional manner. *See Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) (explaining factors to be considered when evaluating likelihood of misidentification because of suggestiveness of confrontation procedures). While one-man showups have been criticized as "inherently suggestive and a practice to be avoided," *United States v. Sanders*, 547 F.2d 1037, 1040 (8th Cir. 1976), *cert. denied*, 431 U.S. 956 (1977), evidence of such a showup without more does not violate due process. *See Pratt v. Parratt*, 615 F.2d 486, 488 (8th Cir.), *cert. denied*, 449 U.S. 852 (1980). The question is whether the showup was impermissibly suggestive, and if so whether in all of the circumstances of the case the suggestive confrontation created "a very substantial likelihood of irreparable misidentification." *See United States v. Henderson*, 719 F.2d 934, 936 (8th Cir. 1983) (internal quotations and citation omitted). In assessing reliability, we consider

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[5] For example, at the preliminary hearing Callaghan testified that Brodnicki wore a green, red, and yellow shirt, and had gray hair. This is irrelevant to our probable cause analysis because it happened after the police officers already had arrested Brodnicki based on their determination that they had probable cause to do so.

such factors as the opportunity of the witness to view the suspect during the commission of the crime; the witness's degree of attention; the accuracy of the witness's prior description of the suspect; the level of certainty demonstrated by the witness at the confrontation; and the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199-200. Applying these factors to the showup in this case, we find the showup was not impermissibly suggestive. Callaghan had ample opportunity to observe the man she alleged had tried to entice her into his car; it was daytime and her view of the driver was not obstructed. She gave the police a detailed description of the man and the car that he allegedly was driving. Her description of the man did not precisely fit Brodnicki, but was not totally off the mark either; the inconsistencies were not so glaring as necessarily to cast doubt on her story. She was certain in her identification of Brodnicki at the showup. The showup took place on the same afternoon as the alleged incident and within an hour of Callaghan's report of the incident to the police. In these circumstances, we conclude that the showup created, at most, only a minimal likelihood of misidentification, and that it therefore was not unreasonable for the police officers to rely on Callaghan's positive identification of Brodnicki in making their probable cause determination.

Because we conclude that the officers had probable cause to arrest Brodnicki, he has no basis for his § 1983 claim against them. *See Warren v. City of Lincoln*, 864 F.2d 1436, 1441 (8th Cir.), *cert. denied*, 490 U.S. 1091 (1989). In addition, since the officers did not violate Brodnicki's constitutional rights, it follows that Brodnicki's claim against the City of Omaha under a theory of inadequate

training or municipal custom lacks merit. *See e.g., Abbott v. City of Crocker,* 30 F.3d 994, 998 (8th Cir. 1994) (holding that city cannot be held liable on a failure to train theory unless the police officer is found liable on the underlying substantive claim). Accordingly, the District Court did not err in granting summary judgment for the officers and the City on Brodnicki's § 1983 claims against them. We need not and do not consider the officers' qualified immunity defense, which the District Court did not address, presumably because the record that already had been developed so clearly supported the officers, alternative motion for summary judgment on the merits.

III.

Brodnicki argues that the District Court improperly granted summary judgment on his § 1983 claim against county attorney Jansen. Claiming that Jansen violated his due process rights in prosecuting him for attempted kidnapping, Brodnicki contends that Jansen's actions during the handling of his criminal case fell outside the protection of absolute immunity normally afforded prosecutors. Brodnicki asserts that he was deprived of due process when Jansen stepped outside of his role as advocate for the state and instead took on administrative functions akin to a police detective. According to Brodnicki, Jansen is not entitled to absolute immunity for: (1) Jansen's request to examine certain polygraph charts; (2) Jansen's oversight of his investigator who interviewed potential alibi witnesses in preparation for a bond revocation hearing; and (3) a meeting held between Jansen and Brodnicki's counsel, at the latter's request, to discuss the case.

We hold that the District Court correctly concluded that Jansen is entitled to absolute immunity.

Prosecutors may be entitled to either absolute or qualified immunity from civil liability under 42 U.S.C. § 1983 for actions undertaken pursuant to their official duties. If the prosecutor is acting as advocate for the state in a criminal prosecution, then the prosecutor is entitled to absolute immunity. *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2615 (1993). Absolute immunity covers prosecutorial functions such as the initiation and pursuit of a criminal prosecution, the presentation of the state's case at trial, and other conduct that is intimately associated with the judicial process. *Id.*; *Imbler v. Pachtman*, 424 U.S. 409, 430-31 n.33 (1976). In contrast, a prosecutor is entitled only to qualified immunity when he pursues actions in an "investigatory" or "administrative" capacity. *Buckley*, 113 S. Ct. at 2616. In determining whether particular actions of government officials fit within the absolute or qualified immunity standard, the Supreme Court has adopted a functional approach that looks to "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1987) (finding state court judge does not have absolute immunity from damages suit for his administrative decision to demote and dismiss a court employee); *see also Buckley*, 113 S. Ct. at 2618 (holding prosecutor's comments to the media have no functional tie to the judicial process because they do not involve presentation of state's case in court or initiation of prosecution); *Burns v. Reed*, 500 U.S. 478, 494 (1991) (finding absolute immunity from liability for damages under § 1983 does not apply to state prosecutor's giving of legal advice to police but

does extend to his participating in probable cause hearing); *Imbler,* 424 U.S. at 431 (holding prosecutor is absolutely immune from activity of initiating prosecution or for actions taken in presenting state's case).

Brodnicki asserts that Jansen's review of the polygraph results was investigative work usually performed by the police, and therefore Jansen is not entitled to absolute immunity. We disagree. While it may be true that some of Jansen's actions on this case are similar to those performed by the police or other administrative agents of the state, our inquiry focuses not on whether the act could be performed by the police as investigators, but rather on whether the act was closely related to Jansen's role as an advocate for the state. *See Buckley,* 113 S. Ct. at 2615. It is fundamental that "[p]reparation both for the initiation of the criminal process and for trial, may require the obtaining, reviewing, and evaluating of evidence." *Imbler,* 424 U.S. at 431 n.33. In this case, Brodnicki's counsel brought the results of Brodnicki's polygraph test to Jansen in an effort to persuade him to dismiss the case. As county attorney, Jansen was under a duty to review this information as part of his role as advocate for the state. Jansen reviewed the polygraph results to determine whether the case should proceed or should be dismissed. Jansen is entitled to absolute immunity for these actions. To hold otherwise would be to fashion a rule that would allow defense counsel to defeat absolute immunity by initiating a meeting with the prosecutor and asking the prosecutor to review the case with an eye toward dismissal of the charges. Such a rule has no support in the law and will not be countenanced here.

Brodnicki also asserts that because Jansen had not assigned Brodnicki's case to himself (a deputy county attorney had been placed in charge of the case) and because, according to Brodnicki, Jansen played merely an administrative role in the case, he is entitled only to qualified immunity. This argument is without merit. One of Jansen's responsibilities as county attorney includes supervision of all of the deputy county attorneys in both criminal and civil matters. It is irrelevant that Jansen was not the trial attorney assigned to Brodnicki's case. As county attorney, Jansen is the person to whom his deputy county attorneys must come for permission to dismiss a case. At oral argument, Brodnicki's counsel conceded that the primary reason he went to Jansen with the polygraph results was to persuade Jansen to dismiss the charges. In short, counsel asked Jansen to exercise his professional judgment and Jansen did so, although not with the immediate result counsel wished. It is precisely the exercise of professional judgment of this sort that is at the core of Jansen's role as advocate for the state. We thus conclude that Jansen is absolutely immune for the decisions that he made with respect to the disposition of Brodnicki's case. *See Zar v. South Dakota Bd. of Examiners*, 976 F.2d 459, 466 (8th Cir. 1992); *Williams v. Hartie*, 827 F.2d 1203, 1210 (8th Cir. 1987).

Brodnicki maintains that Jansen is not entitled to absolute immunity with respect to the interviews that Jansen's investigator conducted with Brodnicki's potential witnesses. Here again, Brodnicki's arguments are without merit. These interviews were conducted during the pendency of a proceeding to revoke Brodnicki's

release on bond.[6] Brodnicki concedes that the interviews could be viewed either as preparation for the revocation hearing or as an evaluation of the reliability of the witnesses. Under either view, Jansen was carrying out his responsibilities as advocate for the state and is entitled to absolute immunity.

Finally, Brodnicki argues that Jansen erred in believing that Brodnicki was guilty of a crime and in deciding to pursue a criminal action against him. This argument misses the point. While Brodnicki may believe that Jansen's decision to pursue the case was incorrect, Jansen does not have to defend alleged prosecutorial mistakes if those mistakes occurred in the performance of a function recognized as inherent in his role as advocate for the state. *Myers v. Morris,* 810 F.2d 1437, 1446 (8th Cir.), cert. denied, 484 U.S. 828 (1987). The decisions relating to the initiation and dismissal of cases are at the very heart of a prosecutor's function as an advocate for the state, and absolute immunity thus attaches to those decisions.

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[6] One of the conditions of Brodnicki's release on bond was that he have no contact with Callaghan. Callaghan reported that Brodnicki, while released on bond, had attempted to contact her at her home. A revocation hearing was held before the district court of Douglas County to determine if in fact Brodnicki had violated this condition of his release on bond. Because of time problems, the court was unable to hear the testimony of Brodnicki's witnesses, and the hearing was ordered continued, without a date certain being set for its resumption. During the continuance, the county attorney's office sent an investigator to interview Brodnicki's witnesses. The bond revocation proceedings were not pursued and the case later was dismissed.

Having considered all Brodnicki's arguments, we hold that the District Court was correct in dismissing Brodnicki's claims against Jansen on the ground that Jansen is entitled to absolute immunity from suit on those claims.

For the foregoing reasons, the judgment of the District Court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

EDWARD BRODNICKI, Plaintiff, v. CITY OF OMAHA, NEBRASKA, a municipal corporation, Defendant.	8:CV93-00098 MEMORANDUM OPINION (Filed Feb. 24, 1995)

This matter is before the Court on defendant City of Omaha's motion for summary judgment pursuant to Fed. R. Civ. P. 56(c) (Filing No. 69).[1] For the following reasons, defendant's motion should be granted.

The factual background and applicable standard of review are fully set forth in the Court's opinions of July 7, 1994 (Filing No. 41), and January 25, 1995 (Filing No. 71), and will not be repeated here. The plaintiff opposes defendant's motion on the ground that the City of Omaha did not adequately train its police officers in the investigation, interviewing, and identification techniques of child victims/witnesses. According to plaintiff, this alleged failure constitutes a pattern or practice that ultimately violated the plaintiff's due process protection actionable under 42 U.S.C. § 1983.

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[1] Defendants James Jansen and Douglas County were dismissed pursuant to the order of the Court entered July 7, 1994 (Filing No. 41). Defendants McCaslin, Donlan, Theulan, Skanes, Swanson and Hoch were dismissed pursuant to the order of the Court entered January 26, 1995 (Filing No. 71).

Upon review of the parties' briefs, the Court finds that it is unnecessary to engage in a detailed examination of plaintiff's substantive claim. In the Court's memorandum and order filed January 26, 1995, the Court concluded that the police officers named in plaintiff's complaint did not violate plaintiff's Constitutional rights. Having so concluded, plaintiff cannot press a claim against the City of Omaha under the theory of inadequate training or municipal custom. *Los Angeles v. Heller,* 475 U.S. 796, 799 (1986) (holding that an award of damages is unavailable against a municipality based on the actions of one of its police officers when in fact the jury has concluded that the officer inflicted no constitutional harm); *Reynolds v. Little Rock,* 893 F.2d 1004, 1007 (8th Cir. 1990), *cert. denied,* 501 U.S. 1204 (1991) (ruling that where there is no underlying constitutional violation, the presence or absence of policies which permit the use of excessive force is quite beside the point (citations omitted)); *Abbot v. Crocker,* 30 F.3d 994, 998 (8th Cir. 1994) (concluding that the city cannot be liable on a failure to train theory or municipal custom or policy theory, unless the police officer is found liable on the underlying substantive claim). Plaintiff's claim against the City of Omaha must therefore be dismissed. A separate order will be filed in accordance with this memorandum opinion.

DATED this 24th day of February, 1995.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, District Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

EDWARD BRODNICKI, Plaintiff, v. CITY OF OMAHA, NEBRASKA, a municipal corporation; PATRICK A. McCASLIN, KEVIN DONLAN, JEFFERY J. THEULEN, JOHN SKANES, JOHN SWANSON and MICHAEL HOCH, Defendants.	8:CV93-00098 MEMORANDUM AND ORDER (Filed Jan. 25, 1995)

This matter is before the Court on defendants Patrick A. McCaslin, Kevin Donlan, Jeffery J. Theulen, John Skanes, John Swanson, and Michael Hoch's motion for summary judgment pursuant to Fed. R. Civ. P. 56(c) (Filing No. 45). For the following reasons, defendants' motion should be granted.

BACKGROUND

The material facts of this case are undisputed.[1] On March 17, 1992, at approximately 5:20 p.m., Omaha Police Department Officers Patrick A. McCaslin and Jeffery J.

[1] The facts pertinent to this motion are largely identical to those contained in the Court's Memorandum Opinion entered July 7, 1994 (Filing No. 41) which dismissed the plaintiff's complaint against James Jansen and Douglas County.

Theulen were dispatched to an Omaha address to interview nine-year-old Meaghan Callaghan regarding her report of an abduction attempt against her. She told the officers that approximately fifteen (15) minutes earlier, while she was on her way home after playing with friends, she was approached by a man near 45th and Hickory Streets who had dirty blonde hair, a moustache, wore sunglasses, a black hat and a black shirt, and drove a white vehicle with license plate number 1-AA864. She stated that the man opened the car window and said "Your mother's going to be late at work and she told me to pick you up." Callaghan refused to get into the car but the man followed her for approximately two blocks repeating his request for her to get into his car.

The license plate number reported by Callaghan was quickly traced to the registered owner of a white Volkswagen, Edward Brodnicki, who lived at 4420 Walnut Street. While the other officers were at the Callaghans', Omaha Police Officer Kevin Donlan arrived at Brodnicki's home and examined the car bearing the reported license plate number. Brodnicki saw Donlan inspecting his car and asked for an explanation, but Donlan refused to comment and told Brodnicki to stay inside his home.

Minutes later McCaslin arrived at Brodnicki's and also examined the car. McCaslin later testified at Brodnicki's preliminary hearing that the engine felt cool. McCaslin left Brodnicki's and later returned in a police cruiser with Callaghan and her father.

While seated in the police cruiser parked in front of Brodnicki's home, Callaghan immediately identified Brodnicki's car as the vehicle that followed her. At the

same time, Donlan and McCaslin had Brodnicki stand in his front yard while Callaghan "took a look at him" from the cruiser (Plf's Exh. 10, p. 5, McCaslin's Police Report). Theulen advised McCaslin that Callaghan made a positive identification of Brodnicki as the man driving the car that followed her. Callaghan also identified a pair of sunglasses hanging on the rearview mirror of the Volkswagen as the same pair worn by Brodnicki. McCaslin and Donlan obtained permission from Brodnicki to search his automobile wherein they seized the sunglasses, a yellow baseball hat and a gray stocking cap which were located on the passenger seat of the car.

Brodnicki was taken to Central Police Headquarters and interrogated by Officer John Swanson. During the interrogation sessions, Brodnicki told Swanson that he was an archeologist for the Corps of Engineers and an adjunct professor for the University of Nebraska at Omaha. He explained that he arrived home at around 3:30 p.m. and was busy making dinner and grading papers during the time Callaghan claimed that he approached her. Brodnicki claims he advised Swanson that, if interviewed, his neighbors would corroborate his statement that he did not leave his home during the afternoon of March 17. None of Brodnicki's neighbors were ever contacted by law enforcement officials.

Swanson and Officer John Skanes, who had earlier interviewed Callaghan at police headquarters, concluded that her statement and the corroborating evidence provided them with sufficient evidence to charge Brodnicki for attempted kidnapping. Brodnicki was held at police

headquarters for forty-four hours before his arraignment on March 19.[2]

In her testimony at the preliminary hearing, Callaghan stated that Brodnicki approached her at 45th and Walnut Streets, that he wore a green, red, and yellow shirt, had gray hair and was not certain if he had a moustache. Although this testimony contradicted her initial report to the police, Brodnicki was bound over for trial and released on bond.

On August 27, 1992, Brodnicki hired his own team of investigators and, through neighborhood interviews, established evidence that his car did not move after he arrived home from work in March 17th at 3:30 p.m. His investigators also interviewed the children with whom Callaghan was playing the afternoon of the incident and learned that, unbeknownst to Callaghan, one child followed her on her way home. The playmate stated that Brodnicki's car was parked on the street and that she never saw the car or Brodnicki approach Callaghan as she passed. Once this information was confirmed by the County Attorney's Office, the charges against Brodnicki were dismissed on December 11, 1992.

Brodnicki now comes to this Court pursuant to 28 U.S.C. §§ 1343(a)(3), (4), and 28 U.S.C. § 1331, alleging violations of 42 U.S.C. §§ 1983, 1988, as well as various

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[2] Officer Michael Hoch did not participate in initial interrogation or arrest of Brodnicki. Plaintiff nevertheless named Hoch as a defendant, apparently because Hoch conducted a follow up investigation of Brodnicki's background on March 18, 1992.

state law claims under the doctrine of "pendant" jurisdiction, now codified as "supplemental" jurisdiction under 28 U.S.C. § 1367. The thrust of Brodnicki's complaint against the police officers is that his arrest constituted a deprivation of his liberty without due process of law in violation of 42 U.S.C. § 1983, and the Fourth, Fifth and Fourteenth Amendments of the United States Constitution.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment will not lie if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In order for the moving party to prevail, it must demonstrate to the Court that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 322 (1986). A fact is material only when its resolution affects the outcome of the case. *Anderson*, 477 U.S. at 248. A material issue is genuine if it has any real basis in the record. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). On a motion for summary judgment, all evidence and inferences are to be viewed in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 250. However, the nonmoving party may

not rest on mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. *Celotex*, 477 U.S. at 324. And if plaintiff cannot support each essential element of his claim, summary judgment must be granted because a complete failure of proof regarding an essential element necessarily renders other facts immaterial. *Id.* at 322-23. The Court reviews defendants' motion for summary judgment in light of the forgoing standard.

DISCUSSION

There is no question in this case of Brodnicki's innocence. But, because "[t]he Constitution does not guarantee that only the guilty will be arrested," *Baker v. McCollan*, 443 U.S. 137, 145 (1979), Brodnicki's innocence is irrelevant to the question of whether there was probable cause for his arrest. *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979) (holding that the validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the subject is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest).[3]

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[3] This is a tragic case because the plaintiff may well have suffered irreparable injury because of Callaghan's false charges. Indeed, it appears to the Court from the evidence presented that had a minimal investigation been pursued at the beginning of this episode, evidence would have been developed that Callaghan often created imaginary threats and villains and made a habit of reporting them to her friends and others. This leaves the Court puzzled as to why no one, including Callaghan's parents, alerted the police to Callaghan's history of making such allegations. Since the County Court found

The issue before the Court is whether the police had probable cause to arrest Brodnicki. A warrantless arrest without probable cause violates the Constitution and forms the basis for a § 1983 claim. If there was probable cause for the officers' actions, however, they cannot be held liable. *Hannah v. Overland*, 795 F.2d 1385 (8th Cir. 1986). When the facts are not in dispute, whether probable cause existed is a question of law, and summary judgment is appropriate. *White v. Pierce County*, 797 F.2d 812, 815 (9th Cir. 1986).

The United States Supreme Court articulated the test for probable cause in *Beck v. Ohio*, 379 U.S. 89 (1964):

> Whether [an] arrest was constitutionally 5valid [sic] depends . . . upon whether, at the moment the arrest was made, the officers had probable cause to make it – whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [person arrested] had committed . . . an offense.

Id. at 91. The Supreme Court has acknowledged that it is inevitable that law enforcement officials will from time to time reasonably but mistakenly conclude that probable cause is present, but should nevertheless not be held liable. *Anderson v. Creighton*, 483 U.S. 635 (1987). As the United States Court of Appeals for the Second Circuit has stated, "[e]vidence before the court might be insufficient

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probable cause to bind the plaintiff over for trial, these concerns of the Court are not material to the resolution of the issues presented in this case.

to sustain a finding of probable cause for the [arrest], yet be adequate for the judge to conclude it was reasonable for [the officer] to believe he had a good basis for his actions. *Magnotti v. Kuntz*, 918 F.2d 364, 367 (2d Cir. 1990). Probable cause does require overwhelmingly convincing evidence, but only "reasonably trustworthy information." *Beck*, 379 U.S. at 91. Probable cause "is to be viewed from the vantage point of a prudent, reasonable, cautious police officer on the scene at the time of the arrest guided by his experience and training. *United States v. Davis*, 458 F.2d 819, 821 (D.C. Cir. 1972); *see also United States v. Ortiz*, 422 U.S. 891 (1975). The Court must therefore consider the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information at the time of arrest.

As the Court's recitation of the facts reveals, Callaghan reported that she was approached by a man in a white car with license plate number 1-AA864, who had dirty blonde hair, a moustache, and who wore sunglasses, a black hat and a black shirt. Callaghan's description was generally consistent with the evidence found by the police: Callaghan's description of the license plate number, color and location of the car corresponded with Brodnicki's; property seized in Brodnicki's car included a pair of dark sunglasses like those described by Callaghan; and Callaghan positively identified Brodnicki during the "showup"[4] while he stood in his front yard. Indeed, the

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[4] In a "showup," as opposed to a "lineup," a single individual is exhibited to a witness and that witness is asked whether she can identify the individual as the perpetrator of the crime being investigated.

Eighth Circuit has recognized the inherent reliability of a victim-witness identification. *United States v. Easter*, 552 F.2d 230, 233-34 (8th Cir.), *cert. denied*, 434 U.S. 844 (1977) (*see also Myers v. Morris*, 810 F.2d 1437, 1457 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987)). These undisputed facts, as well as the fact that Brodnicki did not have a corroborating alibi at the time of his arrest, convinces the Court that the police officers acted with probable cause when arresting and charging Brodnicki with the attempted kidnapping of Callaghan.

Certainly inconsistencies in Callaghan's description existed at the time of Brodnicki's arrest: Brodnicki had dark brown hair as opposed to dirty blonde; he wore a beard but no mustache; and he was dressed in a brown rather than a black shirt at the time of his arrest. However, the Court finds it reasonable that during the investigation of Callaghan's report that the officers could have concluded that the black hat may have been inside Brodnicki's home – where they did not search – and that Callaghan simply confused a black shirt for a brown one, a beard for a moustache and hair that was reportedly covered by a hat as dirty blonde when Brodnicki's was actually dark brown. When these inconsistencies are considered in light of the totality of the circumstances, it is apparent that the evidence favoring probable cause considerably outweighs the evidence against it. As the Supreme Court stated in *Brinegar v. United States*, 338 U.S. 160 (1949), "In dealing with probable cause, as the very name implies, the police deal with probabilities. These are not technical, they are the factual and practical considerations of everyday life on which reasonable and prudent men not legal technicians act." *Id.* at 175.

The Court recognizes that a considerable amount of plaintiff's argument against summary judgment is that the "showup" was so suggestive that it was improper to include it in the probable cause calculation. However, "the mere failure of a 'show-up' to pass constitutional requirements, without a showing of resulting prejudice, does not establish a constitutional deprivation." *Hensley v. Carey*, 818 F.2d 646, 649 (7th Cir), *cert. denied*, 484 U.S. 965 (1987) (*citing Cerbone v. County of Westchester*, 508 F. Supp. 780 (S.D.N.Y. 1981); *see Warren v. Lincoln*, 864 F.2d 1436, 1442 (8th Cir), *cert. denied*, 490 U.S. 1091 (1989). No violation of the due process clause occurs unless an improper identification has some prejudicial effect on the plaintiff's Constitutional guarantees to a fair trial and the procedural rules prohibiting the introduction of evidence derived from unduly suggestive lineups. In the instant case, plaintiff has no § 1983 claim arising out of the showup for the reason that since he was not tried, he could not have been denied the right to a fair trial.

CONCLUSION

Because the Court finds that the police officers arrested Brodnicki with probable cause, plaintiff's complaint against Officers McCaslin, Donlan, Theulen, Skanes, Swanson and Hoch should be dismissed. Accordingly,

IT IS ORDERED that defendants' motion for summary judgment is granted; plaintiff's complaint against Officers McCaslin, Donlan, Theulen, Skanes, Swanson and Hoch is dismissed.

DATED this 25th day of January, 1995.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, District Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

EDWARD BRODNICKI, Plaintiff, v. CITY OF OMAHA, et al., Defendants.	8:CV93-000098 MEMORANDUM OPINION (Filed Jun. 13, 1994)

This matter is before the Court on defendant Douglas County and defendant James Jansen's motion for summary judgment (Filing No. 22). The Court finds that the defendants' motion is well taken and should be granted.[1]

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment will not lie if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v.*

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[1] Defendants City of Omaha, Patrick A. McCaslin, Kevin Donlan, Jeffery J. Theulen, John Skanes, John Swanson, and Michael Hoch have filed separate answers (Filing No. 10) to plaintiff's complaint.

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In order for the moving party to prevail, it must demonstrate to the court that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A fact is material only when its resolution affects the outcome of the case. *Anderson*, 477 U.S. at 248. A material issue is genuine if it has any real basis in the record. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). On a motion for summary judgment, all evidence and inferences are to be viewed in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 250. However, the nonmoving party may not rest on mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. *Celotex*, 477 U.S. at 324. And if the plaintiff cannot support each essential element of his claim, summary judgment must be granted because a complete failure of proof regarding an essential element necessarily renders other facts immaterial. *Id.* at 322-23. The Court reviews defendants' motion for summary judgement in light of the forgoing standard.

FACTS

According to plaintiff's complaint, on March 17, 1992, at approximately 5:30 p.m., Omaha Police Department Officers Patrick A. McCaslin ("McCaslin") and Jeffery J. Theulen ("Theulen") were dispatched to an Omaha address to interview nine-year-old Meaghan Callaghan ("Callaghan") regarding her report of an abduction attempt against her. She told the officers that approximately 15 minutes earlier, while she was on her way

home after playing with friends, she was approached by a man near 45th and Hickory Streets who had dirty blonde hair, a moustache, wore sunglasses, a black hat and a black shirt, and drove a vehicle with license plate number 1-AA864. She stated that the man opened the car window and said "Your mother's going to be late at work and she told me to pick you up." Callaghan refused to get into the car but the man followed her for approximately two blocks repeating his request for her to get into his car.

The license plate number reported by Callaghan was quickly traced to the registered owner of the car, Edward Brodnicki ("Brodnicki" or "plaintiff") who lived at 4420 Walnut Street. While the other officers were at the Callaghans', Officer Kevin Donlan ("Donlan") arrived at Brodnicki's home and examined the car bearing the reported license plate number. Brodnicki saw Donlan inspecting his car and asked for an explanation, but Donlan refused to comment and told Brodnicki to stay inside his home.

Minutes later McCaslin arrived at Brodnicki's and also examined the car. McCaslin later testified at Brodnicki's preliminary hearing that the engine felt cool. McCaslin left Brodnicki's and later returned with Callaghan and her father. She identified the car as the one that followed her and Brodnicki as the driver. Brodnicki's car was searched and McCaslin recovered a pair of prescription sunglasses, a gray stocking cap and a yellow baseball cap.

Brodnicki was taken to Central Police Headquarters ("Headquarters") and interrogated by Officer John Swanson ("Swanson"). During the interrogation sessions,

Brodnicki told Swanson that he was an archeologist for the Corps of Engineers and an adjunct professor for the University of Nebraska at Omaha. He explained that he arrived home at around 3:30 p.m. and was busy making dinner and grading papers during the time Callaghan claimed that he approached her. Brodnicki claims he advised Swanson that, if interviewed, his neighbors would corroborate his statement that he did not leave his home during the afternoon of March 17. None of Brodnicki's neighbors were ever contacted by law enforcement officials.

Swanson and Officer John Skanes ("Skanes"), who had earlier interviewed Callaghan at Headquarters, concluded that her statement and the corroborating evidence provided them with sufficient evidence to charge Brodnicki for attempted kidnapping. Brodnicki was held at Headquarters for forty-four hours before his arraignment on March 19.

Between his arraignment and his preliminary hearing on April 7, 1992, Brodnicki underwent a polygraph exam in his attorney's office that showed he made no deceptive statements regarding the alleged attempted kidnapping. The results were given to Douglas County Attorney James Jansen ("Jansen").

In her testimony at the preliminary hearing, Callaghan stated that Brodnicki approached her at 45th and Walnut Streets, that he wore a green, red, and yellow shirt, had gray hair and was not certain if he had a moustache. Although this testimony contradicted her

initial report to the police, Brodnicki was bound over for trial and released on bond.[2]

About two months later, on June 15, 1992, Callaghan claimed that Brodnicki circled her home in his car and approached on foot. Such behavior would violate the conditions set for Brodnicki's bond and the Douglas County Attorney's Office therefore filed a motion for bond revocation. The motion was withdrawn, however, when Brodnicki's alibi witnesses were interviewed and placed him at work during the time Callaghan claimed he was at her home.

On August 27, 1992, Brodnicki hired his own team of investigators and, through neighborhood interviews, established evidence that his car did not move after he arrived home from work on March 17 at 3:30 p.m. They also interviewed the children with whom Callaghan was playing the afternoon of the incident and learned that, unbeknown to Callaghan, one child followed her on her way home. The playmate stated that Brodnicki's car was parked on the street and that she never saw the car or Brodnicki approach Callaghan as she passed. Once this information was confirmed by the County Attorney's Office, the charges against Brodnicki were dismissed on December 11, 1992.

Brodnicki now comes to this Court pursuant to 28 U.S.C. §§ 1343(a)(3),(4) and 28 U.S.C. § 1331 alleging violations of 42 U.S.C. §§ 1983, 1988, as well as various

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[2] When Callaghan gave her initial report, she told police that the perpetrator approached her on Hickory Street, wore a black shirt, had blonde hair and a moustache.

state law claims under the doctrine of "pendant" jurisdiction, now codified as "supplemental" jurisdiction under 28 U.S.C. § 1367. Brodnicki claims that defendant Jansen was responsible for filing false criminal charges for which Brodnicki was wrongly imprisoned, and as a result, he experienced inconvenience, harassment, humiliation, embarrassment, mental anguish and anxiety. He argues that all of the foregoing are the direct and proximate result of defendants' negligent omissions and continued failure to investigate and were done with recklessness, malice, and callous indifference to Brodnicki's federally protected rights. He asks for actual expenses, $500,000 for embarrassment, loss of reputation and related emotional trauma, punitive damages in excess of $300,000, and costs and fees.

DISCUSSION

Jansen and Douglas County have filed this motion for summary judgment arguing, *inter alia*, that Jansen is immune from suit under the theory of absolute immunity and that Douglas County is not liable under the *Monell* rule. The Court addresses these arguments in order.

PROSECUTORIAL IMMUNITY

The United States Supreme Court has adopted a functional analysis to determine which actions performed by a prosecutor are protected by absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976); *Burns v. Reed*, 500 U.S. 478, 491-92 (1991); *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S. Ct. 2606, 2612-13 (1993). This approach looks to "the nature of the function performed, not the

identity of the actor who performed it." *Buckley*, ___ U.S. at ___, 113 S. Ct. at 2616 (citing *Forrester v. White*, 484 U.S. 219, 229 (1987)).

In *Imbler*, the Court held that a state prosecutor was absolutely immune for actions taken during the initiation and pursuit of a criminal prosecution, including presentation of the state's case at trial. *Imbler*, 424 U.S. at 421. The Court found that the potential liability of a prosecutor and the constant distraction of having to defend himself from vexatious litigation supported the rule of absolute immunity for the conduct of prosecutors that is "intimately associated with the judicial phase of the criminal process." *Id.* at 430. However, a prosecutor sheds his absolute immunity for actions taken in an "investigatory" or "administrative" capacity. In such instances a prosecutor is entitled only to qualified immunity. *Id.* at 431.

In *Burns*, the Court applied the *Imbler* approach to pre-trial activities, holding that the prosecutor's participation in a probable cause hearing was covered by absolute immunity, but giving legal advice to police officers regarding the requisite evidence to support a search warrant was not. *Burns*, 500 U.S. at 492, 496. Under the *Imbler* analysis, the prosecutor's appearance before a judge or magistrate and presenting evidence in support of a motion for a search warrant involved the prosecutor's "role as advocate for the [s]tate" and was "intimately associated with the judicial phase of the criminal process." *Id.* at 492. Such actions, therefore, are protected by absolute immunity.

However, the *Burns* Court refused to extend prosecutorial immunity to the legal advice given to the police

by the prosecutor: "We do not believe . . . that advising the police in the investigative phase of a criminal case is so 'intimately associated with the judicial phase of the criminal process,' that it qualifies for absolute immunity." *Id.* at 493 (citing *Imbler*, 424 U.S. at 430).

In the instant case, the plaintiff argues that Jansen performed three actions during the handling of Brodnicki's criminal case that fall outside the protection of absolute immunity and thus provide the basis for suit. These actions are (1) Jansen's request to examine, and "presumably defendant did examine," the polygraph charts of the plaintiff; (2) Jansen's "administration" of Damien Turner ("Turner"), who interviewed the plaintiff's alibi witnesses in preparation for the bond revocation hearing; and (3) a meeting between Jansen and plaintiff's counsel to "discuss the discrepancies in the police reports, the preliminary hearing and the bond revocation hearing."[3] (Plf's Br. p. 12-13). Thus, applying the analysis forged in *Imbler* and its progeny, the Court must determine if these functions are intimately associated with the criminal and advocacy process so as to qualify for absolute immunity. Regarding the polygraph test, the Court first notes that in his brief in opposition to defendants' motion, the plaintiff clearly states that the polygraph test was privately administered by plaintiff's counsel and by James Martin Davis, a consulting attorney ("Davis"). Jansen was not made aware of the results of

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[3] Plaintiff concedes that Jansen is absolutely immune from suit on the Fourth Cause of Action (false arrest and false imprisonment) and the Fifth Cause of Action (malicious prosecution) (Plf's Br. p. 12).

this test, or that the test was even administered, until Davis telephoned Jansen with the results. Jansen asked to see the results and the actual polygraph chart, which the Court presumes Jansen reviewed. (Plf's Br. p. 1-2).

Plaintiff argues that Jansen used the polygraph results and chart in an "investigatory" fashion and is thus not protected by absolute immunity under the *Imbler* functional approach. The Court does not agree. First, the Court recognizes that under *Imbler* and *Burns* the Court has made a clear distinction between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, and the detective's role in searching for the clues and corroboration that gives him probable cause. *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S. Ct. 2606, 2616 (1993). The polygraph results fit squarely into the former category: There is no showing that Jansen's review of the polygraph results was other than a professional examination of potential evidence to be used in preparation for trial; Jansen's examination of the polygraph results was conducted after Brodnicki's arrest and hence it is very unlikely that Jansen could have considered using the results as clues and corroborative evidence to determine if he has probable cause for arrest. It is clear that Jansen examined the results either in anticipation of Brodnicki's defense or perhaps to consider Brodnicki's veracity for truth telling. In either case, the Court finds that Jansen used the polygraph results as an advocate to advance the state's case and he therefore enjoys absolute immunity.

Turning to Jansen's "administration" of Turner, the Court concludes that the interviews he conducted with Brodnicki's neighbors were in an effort to prepare the

state's case for the bond revocation hearing and were, therefore, an intimate part of the judicial process and subject to absolute immunity. As with Jansen's review of the polygraph material, Turner's interviews were not performed to uncover facts or evidence to bring supplemental charges against the plaintiff. To the contrary, the information gathered during these interviews was used in preparation of the state's case to revoke Brodnicki's bond and, ultimately, appears to have led to his exoneration.

The plaintiff also seems to argue that a meeting between Jansen and plaintiff's attorney relates to Jansen's nondiscretionary and advocacy role and consequently is not subject to absolute immunity. Again, similar to plaintiff's request to review the polygraph data, this meeting was requested and scheduled by plaintiff's attorney. It is unfair to the prosecutor to strip him of his absolute immunity simply because he ceded to plaintiff's request to meet and discuss the case. Moreover, aside from failing to provide any causal evidence as to how this meeting constitutionally deprived the plaintiff, there is no support for the notion that this meeting constituted anything but a typical discussion between the parties in anticipation of presenting the case in a court of law. Therefore, after examining all of the evidence in the light most favorable to the plaintiff, the court finds that Jansen's participation in this meeting was a function within his role as an advocate for the state and he is therefore protected by absolute immunity. *Imbler*, 424 U.S. at 431.

ACTION AGAINST DOUGLAS COUNTY

Plaintiff also seeks damages against Douglas County, alleging that Jansen's actions were conducted pursuant to unconstitutional policies and practices approved by the Douglas County Commissioner and other superior officers. Defendant argues that the County does not have control over the prosecutor's office; rather, the county prosecutor adheres to policies and procedures mandated through state statute. Plaintiff's claim against the County, argues the defendant, is without merit.

The Court, however, relies on *Kohl v. Casson*, 5 F.3d 1141, 1148 (8th Cir. 1993), which stands for the proposition that a § 1983 action against a county must fail if the state actors acted with probable cause. (*See also Marx v. Gumbinner*, 905 F.2d 1503, 1505-06 (11th Cir. 1990) (holding that the existence of probable cause is an absolute bar to a section 1983 action for false arrest.)) According to *Kohl*, if the police officers acted as "reasonable officers in determining that there was probable cause to obtain a warrant for [arrest], there can be no basis for liability on the part of the county . . . based upon any alleged inadequacy in the training provided by [the] defendants." The officers and Douglas County Court made an adequate probable cause determination, notwithstanding the County Attorney's later withdrawal of the charges against plaintiff. As the court noted in *Kohl*, no amount of training could have kept the officers who arrested plaintiff from doing what they did "which was to act reasonably on the information available to them at the time." *Id.* at 1148. Viewing all evidence and inferences in the light most favorable to the plaintiff, there was no causal relationship between his arrest and any inadequacy in the

training provided by the county. *Id.* Plaintiffs claim against Douglas County must therefore be dismissed. A separate order will be entered in accordance with this memorandum opinion.

DATED this 13TH day of June, 1994.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

EDWARD BRODNICKI, Plaintiff, v. CITY OF OMAHA, et al., Defendants.	8:CV93-000098 ORDER (Filed Jun. 13, 1994)

Pursuant to the memorandum opinion entered herein, IT IS ORDERED that defendant Douglas County and defendant James Jansen's motion for summary judgment is granted; this action is dismissed as to these two named defendants only.

DATED this 13th day of June, 1994.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EDWARD BRODNICKI, Plaintiff, vs. CITY OF OMAHA, NEBRASKA, a Municipal Corporation, COUNTY OF DOUGLAS, a Nebraska Political Subdivision, PATRICK A. McCASLIN, KEVIN DONLAN, JEFFERY J. THEULEN, JOHN SKANES, JOHN SWANSON, MICHAEL HOCH, MIKE THOMAS, and JAMES JANSEN Defendants.	CIV. NO. 8-CV93-00098 COMPLAINT (Filed Mar. 16, 1993) JUDGE STROM

The plaintiff, by his attorney, Lawrence G. Whelan, complains of the defendants and alleges:

JURISDICTION AND VENUE

1. This court has jurisdiction of the subject matter of this action under 28 U.S.C. §§1343(a)(3) and (4) and 28 U.S.C. §1331 in that the plaintiff alleges violations of 42 U.S.C. §§1983 and 1988. Venue of this action is proper under 28 U.S.C. §1391(b). The plaintiff further invokes the pendent jurisdiction of this Court to consider claims arising under state law. The amount in controversy exceeds the sum or value of $50,000, exclusive of interest and costs.

PARTIES

2. The plaintiff, Edward Brodnicki, is a citizen of the United States of America, residing in Omaha, Nebraska.

3. The defendant, City of Omaha, Nebraska, (hereinafter referred to as "City") is a political subdivision of the State of Nebraska, organized under the laws of the State of Nebraska and owns, operates, manages, directs and controls the Omaha Police Department which employs defendants Patrick A. McCaslin, Kevin Donlan, Jeffery J. Theulen, John Skanes, John Swanson, Michael Hoch and Mike Thomas.

4. The defendant County of Douglas (hereinafter referred to as "County") is a political subdivision of the State of Nebraska, organized under the laws of the State of Nebraska and owns, operates, manages, directs and controls the County Attorney's Office which employs defendant James Jansen.

5. The defendants Patrick A. McCaslin (hereinafter referred to as "McCaslin"), Kevin Donlan (hereinafter referred to as "Donlan"), Jeffery J. Theulen (hereinafter referred to as "Theulen"), John Skanes (hereinafter referred to as "Skanes"), John Swanson (hereinafter referred to as "Swanson"), Michael Hoch (hereinafter referred to as "Hoch") and Mike Thomas (hereinafter referred to as "Thomas") are and were at all times relevant hereto police officers of defendant City, and at all times referred to herein were acting in such capacity as agents, servants and employees of defendant City, and were acting under color of state law. They are sued individually and in their official capacity as police officers of City.

6. The defendant James Jansen (hereinafter referred to as "Jansen"), was and at all times referred to herein was acting in such a capacity as agent, servant and employee of the defendant County, and was acting under the color of state law. He is sued individually and in his official capacity as the County Attorney of Douglas County, Nebraska.

FACTS COMMON TO ALL CLAIMS

7. On March 17, 1992 at approximately 5:30 p.m., McCaslin and Theulen were dispatched to 1610 South 48th Street to interview a nine year old female, Meaghan Callaghan (hereinafter referred to as "Meaghan"), regarding an abduction attempt. Meaghan stated that she was on her way home from a friend's house where she had been playing kickball with at least three friends. She further stated that at approximately 5:15 p.m. she was approached by a man with dirty blond hair, a moustache, wearing sunglasses, a black hat, and black shirt driving a vehicle with license plate number 1 AA 864 in the area of 45th and Hickory Streets. She told McCaslin and Theulen that the man rolled down his window and said "Your mother's going to be late at work and she told me to pick you up." She kept going and the man followed her for approximately two blocks trying to get her in his car.

8. Donlan was working a separate cruiser at the time of the initial dispatch and he proceeded to the registered address of the license plate at 4420 Walnut Street where he observed the vehicle parked on the street. The plaintiff observed Donlan looking over his car and came out of his residence to find out what was going on.

He was told by Donlan that his car may have been involved in a crime but he could not give him any further information and Mr. Brodnicki should go back in his house.

9. McCaslin left Theulen at the Callaghan residence and proceeded to 4420 Walnut Street to assist Donlan. McCaslin checked the car engine and testified at the preliminary hearing that the car felt cool. McCaslin then left and picked up Meaghan, Theulen and Meaghan's father and brought them back to 4420 Walnut Street.

10. Meaghan identified the vehicle as the one the man was driving. McCaslin went up to the residence of the plaintiff and asked him to step outside on his lawn so that he could be viewed by a girl sitting across the street in a police cruiser. The plaintiff stepped out willingly, wherein Meaghan identified him as the man who tried to get her in his car. The plaintiff had dark brown and gray hair, a beard but no moustache and was wearing a brown shirt.

11. McCaslin got permission to search the plaintiff's vehicle wherein he recovered one pair of prescription sunglasses, a gray stocking cap and a yellow baseball hat.

12. McCaslin radioed Central Police Headquarters wherein Thomas advised him to transport the plaintiff to Central Police Headquarters. McCaslin and Theulen then transported the plaintiff to Central Police Headquarters and put him in an interrogation room.

13. At approximately 6:30 p.m., Thomas called Skanes to Central Police Headquarters.

14. Skanes had Meaghan brought to Central Police Headquarters wherein he conducted a second interview with Meaghan.

15. Skanes assigned Swanson to interrogate the plaintiff. The plaintiff told Swanson that he was an archeologist for the Corps of Engineers and an adjunct professor for the University of Nebraska at Omaha. He explained that he had arrived home from work at approximately 3:50 p.m., that he had started a pot roast for dinner and was grading papers up until the time he observed Donlan examining his vehicle. At all times he protested his innocence and asked that they contact his neighbors to see that he had not left his residence. None of the plaintiff's neighbors were ever contacted by law enforcement.

16. Donlan ran a criminal history on the plaintiff and found that he had no criminal record.

17. Swanson conferred with Skanes and "was advised that he had interviewed the victim and based on the victim's statement and the corroborating evidence, the suspect, Edward C. Brodnicki, was to be booked for attempted kidnapping . . . "

18. On March 18, 1992, Hoch contacted the plaintiff's boss, Richard Gorton, wherein he was advised that there had been no complaints against the plaintiff of any kind. Hoch then contacted the plaintiff and received a consent to search the plaintiff's residence. No search was ever conducted which could have verified his activities nor was any further investigation done.

19. The plaintiff was held in a detention facility at Central Headquarters for approximately forty-four (44) hours before being arraigned in Douglas County Court at 2:00 p.m. on March 19, 1992. At that time the plaintiff was released on his own recognizance.

20. On March 24, 1992, the plaintiff took a polygraph exam which showed no deception and the results were turned over to Jansen in the Douglas County Attorney's Office in April 1992.

21. On April 7, 1992 a Preliminary Hearing was held in Douglas County Court. Meaghan testified that the initial contact occurred on 45th and Walnut Streets (rather than 45th and Hickory Streets), that the man in the car was wearing a green, red and yellow checkerboard shirt and that she thought he had a moustache but he has a beard. The plaintiff was bound over to the District Court of Douglas County, Nebraska and his bond was set at two hundred and fifty thousand dollars ($250,000).

22. The plaintiff was again detained for approximately six hours until twenty-five thousand dollars ($25,000) could be borrowed to post his bail.

23. On or about June 15, 1992, Meaghan claimed that the plaintiff had come to her house. The Douglas County Attorney's Office filed a motion for bond revocation. After an investigator for the Douglas County Attorney's Office interviewed the plaintiff's alibi witnesses, they did not pursue the bond revocation. Although this incident lead to further questioning of Meaghan's credibility, there was still no investigation conducted regarding the assertions made by Meaghan on March 17, 1992.

24. On August 27, 1992, the plaintiff hired his own investigators who established, through interviewing his neighbors, that the plaintiff's car had not been moved after he returned home from work. The investigators hired by the plaintiff, in interviewing the friends that Meaghan had been playing with before the alleged incident, discovered that one of the girls had followed Meaghan as far as the plaintiff's residence and had observed Meaghan turn the corner onto 45th Street. The plaintiff's vehicle was parked on the street and at no time did the girl see the plaintiff or his car being moved. It was further discovered that Meaghan had a history of making up stories of this type.

25. Trial was scheduled for the November 30, 1992 jury panel. The State requested and was granted a continuance.

26. The plaintiff informed the County Attorney's Office of the information known by his witnesses.

27. On December 11, 1992, the State dismissed the charges against the plaintiff once Meaghan's friends were interviewed by the Douglas County Attorney's Office.

28. At no time did the plaintiff commit any offense against the laws of the State of Nebraska for which an arrest may be lawfully made. At no time did the plaintiff attempt to abduct, restrain or hold Meaghan for any purpose. At no time did the plaintiff approach, threaten or confront Meaghan; commit any illegal acts; engage in any conduct which in any way justified the detention, arrest or filing of formal charges against the plaintiff; or engage in any conduct which in any way would tend to

make a reasonable person believe that the plaintiff attempted to commit any unlawful act.

29. The false criminal charges against the plaintiff and the plaintiff's wrongful imprisonment were due to the defendants, and each of them, failing to take steps to verify the information supplied by the plaintiff or Meaghan despite the fact that the information could have been accessed by interviewing a few witnesses as the plaintiff asked and by a search of the plaintiff's residence to which he agreed.

30. At the time of his arrest through the time the charges were finally dismissed, the plaintiff experienced inconvenience, harassment, humiliation and embarrassment resulting from the defendants warrantless arrest, detention and failure to investigate the allegations. Subsequent to his arrest, he was incarcerated and required to post bail. The fact that he was arrested on these charges was made available to various newspaper and television media including the Omaha World Herald and KETV, KMTV and WOWT which ran stories about his arrest. The plaintiff experienced public humiliation, embarrassment and has suffered and is suffering substantial mental anguish and anxiety. All of the foregoing were and are the direct and proximate result of the defendants' negligent omissions and continued failure to investigate which resulted in the plaintiff's warrantless arrest and detention as set forth above.

31. As the result of the plaintiff's warrantless arrest and preparation for his defense for attempted kidnapping, the plaintiff has incurred legal and other expenses

which were and are the direct and proximate result of the arrest and detention as set forth above.

32. As the result of the plaintiff's warrantless arrest and detention, the plaintiff suffered severe mental anguish and incurred medical expenses which were and are the direct and proximate result of the arrest and detention as set forth above.

33. As the result of the plaintiff's warrantless arrest, detention and court appearances, the plaintiff was forced to miss time from his employment which was and is the direct and proximate result of the arrest and detention as set forth above.

34. The injury and damage suffered by the plaintiff was caused solely by the omissions and unlawful acts of the defendants.

35. The acts of McCaslin, Donlan, Theulen, Skanes, Swanson, Hoch, and Thomas were taken with recklessness, malice, and callous indifference to the plaintiff's federally protected rights and were the result of said defendants' gross negligence and were extreme and outrageous in the circumstances and said acts were taken pursuant to policies and practices approved by the Chief of Police of the City and other superior officers.

36. The acts of Jansen were taken with recklessness, malice, and callous indifference to the plaintiff's federally protected rights and were the result of said defendant's gross negligence and were extreme and outrageous in the circumstances and said acts were taken pursuant to policies and practices approved by the Douglas County Commissioner and other superior officers.

37. The defendant City, as a matter of policy and practice, has with deliberate indifference failed to adequately discipline, train or otherwise direct police officers concerning the rights of citizens, thereby causing the defendant officers in this case to engage in the unlawful conduct described above.

FIRST CAUSE OF ACTION

38. The plaintiff hereby refers to and incorporates by reference each and every allegation in Paragraphs 1 through 37 above as if fully set forth herein.

39. The acts of the defendants McCaslin, Donlan, Theulen, Skanes, Swanson, Hoch and Thomas with respect to the initial detention of the plaintiff were taken pursuant to the approval of the Chief of Police of City and other superior officers of said defendants pursuant to training approved by said Chief of Police and other superior officers regarding investigation of probable cause to detain suspects and thus was pursuant to custom, policy, or practice of City.

WHEREFORE, the plaintiff prays as set forth below.

SECOND CAUSE OF ACTION

40. The plaintiff hereby refers to and incorporates by reference each and every allegation in Paragraphs 1 through 37 above as if fully set forth herein.

41. The acts of the defendant Jansen with respect to the continued detention and prosecution of the plaintiff were taken pursuant to the approval of the Douglas County Commissioner and other superior officers of said

defendant pursuant to training approved by the County and other superior officers regarding investigation of probable cause to detain suspects and thus was pursuant to custom, policy, or practice of the County.

THIRD CAUSE OF ACTION

42. The plaintiff hereby refers to and incorporates by reference each and every allegation in Paragraphs 1 through 37 above as if fully set forth herein.

43. The acts of the defendants and each of them constituted a deprivation of the plaintiff's liberty without due process of law in violation of 42 U.S.C. § 1983 and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, the plaintiff prays as set forth below.

FOURTH CAUSE OF ACTION

44. The plaintiff hereby refers to and incorporates by reference each and every allegation in Paragraphs 1 through 37 above as if fully set forth herein.

45. The acts of defendants and each of them with respect to the initial arrest and detention of the plaintiff and the detention and arrest for attempted kidnapping constituted false arrest and false imprisonment under the laws of the State of Nebraska, and this court has pendent jurisdiction to adjudicate said claims.

WHEREFORE, the plaintiff prays as set forth below.

FIFTH CAUSE OF ACTION

46. The plaintiff hereby refers to and incorporates by reference each and every allegation in Paragraphs 1 through 37 above as if fully set forth herein.

47. The acts of the defendants and each of them with respect to the malicious institution, without probable cause, of criminal action against the plaintiff, constitute malicious prosecution under the laws of the State of Nebraska, and this court has pendent jurisdiction to adjudicate said claim.

WHEREFORE, the plaintiff prays as set forth below.

SIXTH CAUSE OF ACTION

48. The plaintiff hereby refers to and incorporates by reference each and every allegation in Paragraphs 1 through 37 above as if fully set forth herein.

49. The acts of the defendants and each of them constitute negligent infliction of emotional distress under the laws of the State of Nebraska, and this court has pendent jurisdiction to adjudicate said claims.

WHEREFORE, the plaintiff prays as set forth below.

RELIEF REQUESTED

WHEREFORE, the plaintiff requests judgment as follows:

1. An award to plaintiff of compensatory damages in the amount of his actual expenses incurred in defending against the charges of attempted kidnapping.

2. An award to plaintiff of compensatory damages in an amount in excess of $500,000.00 for the grievous mental suffering, anguish, distress, humiliation, embarrassment and loss of reputation in the community.

3. An award to the plaintiff of punitive damages in an amount in excess of $300,000.00 against McCaslin, Donlan, Theulen, Skanes, Swanson, Hoch, Thomas and Jansen.

4. An award of plaintiff's costs of this suit, including reasonable attorney's fees pursuant to 42 U.S.C. §1988.

5. For such other and further relief that the Court deems just and equitable.

EDWARD BRODNICKI, Plaintiff,

By: /s/ Lawrence G. Whelan

Lawrence G. Whelan (#19217)
1823 Harney Street
Suite 302
Omaha, Nebraska 68102
(402) 342-2412
Attorney for Plaintiff

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1785NEO

Edward Brodnicki,	*	
Appellant,	*	Appeal from the United States District Court for the District of Nebraska
v.	*	
City of Omaha, Nebraska, etc., et al.,	*	
Appellees.	*	

ORDER

The motion of appellant for an extension of time until 2/28/96 to file a petition for rehearing is granted.

February 14, 1996

Order entered Under Rule 27B(a):

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1785NEO

Edward Brodnicki,	*	
Appellant,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
vs.	*	
City of Omaha, Nebraska, et al.,	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 25, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTTER
CLERK OF THE COURT

AREA CODE 202
479-3011

June 14, 1996

Mr. Lawrence G. Whelan
1823 Harney Street
Suite 302
Omaha, NE 68102

Re: Edward Brodnicki
v. City of Omaha, Nebraska, et al.
Application No. A-1032

Dear Mr. Whelan:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on June 14, 1996, extended the time to and including July 23, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Jeffrey D. Atkins
Jeffrey D. Atkins
Assistant Clerk

EXHIBIT 13

"RETURNING A SUSPECT TO THE SCENE OF A CRIME"

GENERAL:

During the investigation of a felony crime, officers may be required to return a suspect to the scene of a crime. When this return becomes necessary, for identification by a witness or victim, before the suspect's arrest, the time lapse between the time the crime was committed and the time the suspect is returned to the scene is of legal importance.

The courts have ruled "within a reasonable period of time" and for all practical purposes, the suspect Shall Not be returned to the scene after a period of 2 hours, but shall be taken to Police Headquarters.

POLICY:

1. When an officer has a suspect, and plans to return the suspect to the scene for possible identification by a witness, he shall first establish that:

   A. A felony is known, or believed to have been committed.

   B. The suspect fits the description of the suspect sought for the crime.

   C. He has probable cause to believe that the suspect has committed the crime.

2. The officer should ask the suspect if he will return to the scene of the crime with him; however, the suspect's cooperation in returning to the scene is not required.

3. If the victim identified the suspect as the person who committed the crime, the officer must advise

the suspect of his Miranda Rights prior to any interrogation.

SUMMARY:

In the trial, "Russell v. United States", 1969, the court distinguished between lineups and on the scene identifications of suspects by witnesses and held that the return of a suspect to the scene of a crime within minutes of its occurrence constitutes no denial of the individual's rights.

EXHIBIT 14

AFFIDAVIT

Douglas P. Peters, Ph.D.
September 23, 1994
Page 1

Douglas P. Peters, being first on his oath duly sworn, disposes and states:

1. Following a telephone conversation with Lawrence G. Whelan on September 19, 1994, I was provided, by mail, with the following material for review concerning State of Nebraska v. Edward Brodnicki and Edward Brodnicki v. Meaghan Callaghan, Martin J. Callaghan and Karen Callaghan:

   a. Copies of the Arrest Report (No. G97566) for Mr. Brodnicki and 13 pages of material contained in two Supplementary Reports (Officer John Skanes, March 17, 1992, and Officer Michael Hoch, March 18, 1992.

   b. A Copy of the April 7, 1992 Probable Cause Hearing relating to State of Nebraska v. Edward Brodnicki.

   c. A Copy of Meagan [sic] Callaghan's June 18, 1992 testimony concerning State of Nebraska v. Edward Brodnicki.

   d. A copy of the September 23, 1992 Deposition of Jeffrey Theulen concerning State of Nebraska v. Edward Brodnicki.

   e. Copies of the November 2, 1993 Depositions of Sara Czaplewski, Jacqueline Czaplewski, and Mary Czaplewski concerning Edward Brodnicki v. Meaghan Callaghan, Martin J. Callaghan and Karen Callaghan.

2. I have attached a copy of my Curriculum Vitae (Exhibit 1) to this AFFIDAVIT as a summary of my professional qualifications and experience. I am a Professor of Psychology at the University of North Dakota with a Ph.D. in Psychology. At the University of North Dakota my teaching duties include graduate courses in Children, Psychology, & the Law, Learning & Memory, and undergraduate courses in Research Methods and Psychology & the Law. The child witness is my main area of scientific research and scholarship. During the past 10 years I have studied over 500 children in my research, examining such topics as the effects of stress and suggestion on children's eyewitness memory, motivations for truth-telling and falsehood in the child witness, and factors that affect identification accuracy with lineups. I am internationally known for this research. I have numerous scientific publications, paper presentations and chaired symposia at professional meetings related to my child witness work. In 1992 I was appointed the Science Director for the first NATO conference on the topic of the child witness, which was attended by scientists, child-care workers, legal scholars, and law enforcement officials from over a dozen countries.

My findings and Opinions with regard to the case material I have reviewed are as follows (Please note, all references cited are fully listed in Exhibit 2):

3. The suspect identification procedure use by Officers McCaslin, Dolan, and Theulen on March 17, 1992, commonly known as a showup, were a 9-year-old girl, Meaghan Callaghan, positively identified Edward Brodnicki, who was standing in the front yard of his home, as the alleged attempted kidnapper, was, in my opinion based on a reasonable degree of professional certainty as an experienced child witness

researcher, highly prejudicial, biased, and suggestive. There are several reasons for this belief.

a. From survey research, there is general consensus among psychological experts in the field of eyewitness testimony that the use of a one-person showup instead of a full lineup increases the risk of misidentification (Kassin, Ellsworth, & Smith, 1989).

b. Most researchers in the area of eyewitness testimony have been forceful in their criticism of showups as being highly suggestive and unfair (Levine & Tapp, 1973; Malpass & Devine, 1983, Sobel, 1985; Wells, Leippe, & Ostrom, 1979; Yarmey, 1979). One line of reasoning notes that because the witness typically responds with a yes-no answer, the showup, with only one possible option to give, makes it difficult to to [sic] catch guessers (or those simply motivated to have someone apprehended). The greater the number of options available to the eyewitness in the lineup, the lower the probability that the suspect may be selected simply by chance. A lineup is viewed as more fair than a showup because it distributes the likelihood of positive identification of an innocent suspect across the lineup foils, thus reducing the overall risk of an identification error. The mistaken identification of a known (to the police) lineup foil helps identify poor witnesses who do not have good, if any, information about the identity of the offender, but who feel they must make an identification. With only one available option, the showup does not allow for the mistaken identification of a foil to be detected. A second argument against showups points to the practice used for lineups where foils are matched to the general description of the suspect. Unlike

showups where relative comparisons to other individuals are impossible, lineups present to the witness similar looking alternatives, and the witness should be less likely to choose someone because he generally resembles the suspect if he is surrounded by others who also generally resemble the suspect.

c. The context in which the witness, in this case a young child, is asked to make an identification is also critical in affecting the outcome. This child witness was brought to the suspect's home after the police had indicated they had located the car described to them by the child. The child was to look at the registered owner of the car and indicate if he was the person who attempted the alleged kidnapping. The police officers brought Mr. Brodnicki out of his home to his front lawn for the child to see. In Officer's [sic] McCaslin's car with the child was her father. It was the father, when he returned home from work, that called the police regarding his daughter's alleged kidnapping attempt. Although the child had originally told her mother, she took no action until the father came home. Presumably, he was highly upset by his daughter's story of an attempted kidnapping and very much wanted the offender apprehended, and it is likely that this emotional state was perceived by his daughter as she was making her identification of Mr. Brodnicki close to the vehicle she had described to her father. Given the scientific literature showing how children can be more suggestible compared to adults (see Ceci, 1994; Ceci & Bruck, 1993; Doris, 1991) and given research findings from my own work with child witnesses (Devitt, Honts, Gillund, Amato, Peters & Norton, 1994; Devitt, Peters, Honts, & Amato, 1992; Peters, 1992; Peters, 1991;)

indicating that children will make intentional eyewitness reporting errors because of strong parental pressure, the setting, described above, surrounding the showup identification of Mr. Brodnicki appears highly biased against him compared to what would be expected from a fairly constructed lineup of similar appearing men at a police station. In my research, using fairly constructed lineups, as many as 50%-70% of my child witnesses will falsely identify an innocent individual from 5-6 person lineups of innocent suspects. This high false identification rate occurs without the biases inherent in showup identifications. For Meaghan Callaghan, or any other young child placed in her particular situation, it would be very difficult to resist a father's strong desire for apprehension and retribution of the perpetrator combined with the powerful suggestion, implicit or explicit, coming from the police officers that the man coming out of Mr. Brodnicki's house, assuming similar general characteristics to the description given by Meaghan, was the guilty suspect. If, in fact, any man fitting the general description of Mr. Brodnicki had walked out of Mr. Brodnicki's house on March 17, 1992 for the showup as described earlier, I would predict, given what the scientific literature tells us about children's suggestibility and motives for lying, that the vast majority of children, like Meaghan Callaghan, would positively identify that individual as the offender.

4. The compensation I will receive for my work in preparing this Affidavit, including reviewing case material and relevant scientific literature, consultation with colleagues, and writing time, is based on a rate of $150 per hour. Should I be required to appear in court to provide expert testimony, my *per diem* costs,

in addition to compensation for travel, food and lodging expenses, will be $150 per hour, not to exceed a total of $1,600 per day.

5. During the past four years I have not testified at trial nor by deposition for any criminal or civil case in the United States.

The above statements reflect my true opinion and knowledge to the best of my ability.

Sincerely,

/s/ Douglas P. Peters
Douglas P. Peters, Ph.D. 9-27-94
Professor of Psychology Date

Subscribed and sworn to before me in Grand Forks, North Dakota, this 27th day of Sept., 1994.

/s/ Teri R. Ward
TERI R. WARD
Notary Public, STATE OF NORTH DAKOTA
My Commission Expires MAY 13, 2000.

EXHIBIT 15

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

EDWARD BRODNICKI, Plaintiff,	)	CV: 93-00098
vs.	)	**AFFIDAVIT**
CITY OF OMAHA, et al., Defendants.	)	

STATE OF KANSAS)
) ss.
COUNTY OF Sedgwick)

I, Michael Palmiotto, being first duly sworn upon oath, do state and allege as follows:

1. That I have been retained by the plaintiff as an expert to assist in the preparation of his case.

2. That I have given plaintiff's counsel my opinions in this matter after review of the materials provided to me and based on my expertise and knowledge in this area I have set forth these opinions in the attached report, marked Exhibit "A" which is attached hereto and incorporated herein.

3. That I am prepared to testify to all matters contained in my report.

FURTHER AFFIANT SAITH NAUGHT.

/s/ Michael Palmiotto
Michael Palmiotto, Ph.D.
Wichita State University
Administration of Justice Dept.
1845 Fairmount Street, Box 95
Wichita, Kansas 67260-0095

SUBSCRIBED and SWORN to before me this 28th day of September, 1994.

/s/ Kimberly Haaga
Notary Public

NOTARY PUBLIC – State of Kansas
KIMBERLY HAAGA
My Appt. Exp. 10-8-97

September 28, 1994

Lawrence G. Whelan, Esq.
1823 Harney Street
Suite 302
Omaha, Nebraska 68102

RE: Brodnicki v. City of Omaha, et al.
CV: 93-0098

Dear Mr. Whelan:

Upon reviewing police reports and court transcripts one area of police procedure that should be questioned: Why did the police decide to conduct a "**showup**" rather than a "**lineup?**" A showup is used in emergency situations or in circumstances when a lineup may be impractical. In the Brodnicki case there does not exist any

emergency nor does there appear to be any legitimate reason for not conducting a lineup.

At the time of the showup the police had no evidence other than a nine year old girl accusing an adult male of a crime. A lineup in this case would have been the appropriate procedure. The police should have been looking for an accurate and independent assessment. A lineup greatly increases the reliability of identification by eye witnesses. A lineup should be used whenever identification by a witness is an important factor in a case. The purpose of the lineup is the elimination of the "power of suggestibility" as a factor of identification. The Omaha police by not conducting a lineup did not eliminate the "power of suggestibility." By the officers taking a nine year old child to the Brodnicki home the suggestibility question has been opened. Mistaken identifications are still common occurrences. Taking a nine year old child to a showup can leave the child (and adult) with the impression that the police have found the right suspect. The "intimidation factor" must also be taken into consideration. A child (or adult) may not want to tell the police that the individual the police consider to be the suspect is wrong.

The police had no justifiable reason for not conducting a lineup. Time was not of the essence. There was no emergency to justify a showup. Brodnicki was not going to flee, he had a professional position, and he had no criminal record. Two actions by the police that may need further inquiry. The child informed the police that the suspect had a mustache while Brodnicki had a full beard without a mustache at the time of the showup. This further indicates the suggestibility of the child at the

showup. Officer Theulan testified during the preliminary hearing that the engine of Brodnicki [sic] automobile was cool. Why was the engine cool if Brodnicki had just used the vehicle?

The lineup was the appropriate identification mechanism to be used in the Brodnicki case. Two other topics that could be covered was the need for addition [sic] investigation and an examination of police interviewing procedures.

/s/ Michael J. Palmiotto
Michael J. Palmiotto, Ph.D

EXHIBIT 21

To: Lawrence Whelan, Esq.

From: Michael Palmiotto, Ph.D.

October 3, 1994

RE: Brodnicki v. City of Omaha, et al.
CV: 93-0098

SUPPLEMENTAL REPORT TO MY ORIGINAL REPORT

Two areas not covered in my original report: the investigation and the interview process. The investigation will be discussed first.

INVESTIGATION

After studying the legal documents forwarded to me I have concluded that the police did not conduct a thorough investigation. Officers Patrick McCaslin and Jeffrey Theulen functioned as note-takers. They wrote down information from Meaghan Callaghan, a nine year old child, and based on a memorized license plate number and an erroneous physical description Mr. Brodnicki was identified as the suspect and subsequently arrested. The police did not conduct a very complete investigation. Meaghan Callaghan reported that Mr. Brodnicki approached her on 45th Street and on Hickory. The police did not canvass the neighborhood on 45th Street or on Hickory in an attempt to locate a witness to the alleged incident. The police also failed to canvass the neighborhood of 4420 Walnut (Brodnicki residence) to locate witnesses to determine if Brodnicki's white Volkswagen was missing during the times when the incident could have

occurred. In addition, the officer's failed to interview the members of the Czaplewski family – Sarah, Jacqueline, or Mary the mother, to determine if they had observed anything unusual. The Czaplewski residence at 4337 Walnut is a short distance from 4420 Walnut Street, the residence of Mr. Brodnicki. If the officer's had spoken to Jacqueline Czaplewski they would have discovered that Jacqueline followed Meaghan Callaghan when she left her home on March 17, 1992. Jacqueline Czaplewski stated: "I followed Meaghan several houses up Walnut when Meaghan left to go home. I saw Meaghan turn into 45th Street toward Hickory. Meaghan was never approached by anyone on Walnut Street. Also, I never saw Mr. Brodnicki come out of his house, get in his car, or his car leave from in front of his house." (Disposition of Jacqueline Czaplewski-11/2/93, page 48) Based on the failure of the police to perform the preceding investigative activities it must be considered that the police did not conduct a competent investigation.

INTERVIEWING PROCEDURES

The second area that the police fall down on is interviewing procedures. Based on the legal documents studied Officers Patrick McCaslin and Jeffrey Theulen did not conduct an interview of Meaghan Callaghan but functioned as report takers writing down the information Meaghan Callaghan provided them. When a police officer (or any social service worker) interviews a child they should have developed techniques to elicit what has happened to the child. A relationship must be established, and language appropriate to the child's age should be established. Only simple open-ended questions should be

asked of the child. The police officers should not be emotional over the event. They need to detach themselves from the event. Investigators interviewing children should be aware that children under six often invent stories when replying to a question. Children from ages six to ten often distort stories. In conducting an interview the officer has as his main objective to gather facts. Information obtained from a victim or witness should be corroborated with information obtained from other individuals. Precise questions should be asked of victims and witness [sic] to confine the information range to the question asked.

The interview by Sgt. John Skanes is suspect. It's a repeat of the note-taking process of Officers Patrick McCaslin and Jeffrey Theulen. How long was the interview? How was the interview conducted? The supplementary report conducted by Sgt. Skanes doesn't shed much light on the interviewing process. The supplementary report was typed by M. L. Granados on March 18, 1992. Where are the original notes? Do they contain the questions asked of Meaghan Callaghan? Were there any questions asked of Meaghan Callaghan? Was the interview audiotape [sic] or videotaped? These techniques are commonly used when interviewing children. Does Sgt. Skanes know how to conduct an interview? Does he know how to interview an [sic] child? Has he received any training on interviewing? Sgt. Skanes interview of Meaghan Callaghan as conducted on March 17, 1992 and typed by M. L. Granados is more of a report than an interview.

When conducting interviews questions are asked to obtain factual information about an incident. The interviewing of a child requires simplicity and clarity in the interviewers questions. The interviewer must be alert to miscommunication. The interviewer is searching for inconsistencies in a child's response. Redundancy in question is useful. Children need to be explained why they are being asked the same question more than once by more than one person. Children about the ages of nine or ten are not expected to provide reliable information as to estimates of time, speed, distance, size, weight, color or to understand relational concepts. The interviewer needs to develop rapport with the child, prepare questions and to reconstruct the scene or circumstances in question. Based upon interviewing processes and reading the typed supplementary report of Sgt. Skanes we can conclude that the interviewer was poorly prepared and that the interview took place in a haphazard manner.

EXHIBIT 16

ROGER K. LaPAGE [LOGO] P.O. Box 255
Eagle, Nebraska 68347
Investigative Consultant Telephone 402-434-6657

September 27, 1994

Mr. Lawrence Whelan
Attorney at Law
1823 Harney, Suite #302
Omaha, NE 68102
FAX 402/342-6752

Re: Brodnicki v. City of Omaha, et al
CV: 93-00098

Dear Mr. Whelan:

All materials sent were reviewed. The documents received were: #1: Record of arrest, #2: Crime against person report-97566G, Supp report/McCaslin, #4: Property Report, #5: Permission for search, #6: Rights advisory form, #7: Inventory sheet, #8: Photo, #9: Supp report/Hoch, #10: Supp report/Skanes, #11: County Court transcript, #12: District Court transcript, #13: Deposition/Theulen, and #14: Affidavit/O'Brien.

After reviewing the above information, I am of the opinion, based on a reasonable degree of professional certainty, that improper identification procedures were used. This was a classic case where a single person was set up to be viewed by a victim who was under pressure to identify. There was too much suggestiveness in the viewing situation. Under those circumstances a fair and unbiased identification could not have been performed.

The 9 year old girl had already committed herself to the i.d. of the vehicle and license number. When driven to the home of this vehicle with her father, who was instrumental in initiating the complaint, in a police cruiser she was told to view a man in the front yard of where the vehicle was parked. What else could she do but identify? Here was a child arriving home late from a friend's home, blurting out this story before Mother could bring up the lateness. Responding officers should have spent more time with the victim's story and if needed arranged a line-up at police headquarters. In this type of setting other persons of the same race, age and physical stature could have been viewed. This would have been the fair and legal way to treat Mr. Brodnicki.

This opinion in based on my training and experience outlined in the brochure and resume previously submitted and attached hereto. I have 20 years of police experience, thirteen of which was in the criminal investigation area and criminal case supervision. I further base my opinion on the training I received concerning procedures for line-ups and identification of suspects. I also have 13 years of private investigation experience in the State of Nebraska being duly licensed and bonded. During this time I have testified as an expert on police procedures numerous times while a commissioned officer and also as a licensed private investigator, the last being in Scotts Bluff District Court in Gering, Nebraska (State V. Green), 1st degree murder, 1992.

In summation concerning the identification process used by the Omaha police officers I point out that the police already had the description of the car and license plate number. In addition they knew the owner and contacted

him. It was a case of either it was Mr. Brodnicki or it was not. There was no other suspect and no other exigent circumstances were present to justify a "showup". With this in mind there was no need to hurry an identification that violated standard police procedure and Mr. Brodnicki's rights.

My fee for investigation, case review and preparation is $40.00 per hour plus any expenses. Likewise, my fee for my presence in court, testifying and preparation is $40.00 per hour with a minimum fee of $200.00 per day.

I hope this information is of value to you, I am

Very truly yours,

/s/ Roger K. LaPage
ROGER K. LA PAGE

encl

IN: R-OFFICE COMMUNICATION

DATE: 29 December 1992

TO: ASSISTANT CHIEF LARRY ROBERTS

FROM: LT. DON THORSON #907

SUBJECT: EDWARD BRODNICKI INVESTIGATION

I have reviewed the reports on the investigation of the alleged attempted abduction of Meaghan CALLAGHAN by Edward BRODNICKI. A full copy of this file under RB# 97566-G has been attached along with a copy of a press release and several court documents, including sworn statements, depositions and a transcript of the preliminary hearing. I will now outline the basic investigative steps taken by the Police Division on this case.

After receiving the original call at 1754 hrs. on 17 March 1992, Ofc. MCCASLIN #1019 and THEULEN #1005 went to the victim's residence at 1610 South 48th Street. Information had also been put out on a suspect vehicle and Ofc. Kevin DONLAN #917 went to the registered address of the car at 4420 Walnut Street and located the car parked in front on the street. After an initial interview with the victim, Officers transported her to the scene of the suspect vehicle and the victim positively identified it as the vehicle that a suspect was in, who had earlier confronted her and tried to talk her into getting into the vehicle. The suspect was contacted in the house and asked to stand in the yard. The victim positively identified the suspect. The suspect gave permission to search his vehicle and also voluntarily went to Central Station with uniform officers to be questioned about the incident.

At Central Station, the suspect, Edward BRODNICKI, was interviewed by Ofc. John SWANSON of the Robbery/Sex Unit. Sgt. John SKANES reinterviewed the victim, Meaghan CALLAGHAN, at Central Station. At the conclusion of these interviews, a decision was made to book Edward BRODNICKI on One Count of Attempted Kidnapping. The following day this case was reviewed by County Attorney Linda SENFF and the decision was made to hold BRODNICKI over until the next day. During the day, BRODNICKI was interviewed one time by Ofc. Mike HOCH, and as with the original interview, he made no admissions about his involvement in this incident. The following morning, the County Attorney's Office decided to file the charge of Attempted Abduction on BRODNICKI and he charged, taken to Court on arraignment and released on a signature bond. On April 7th, a preliminary hearing was held in Douglas County Court and BRODNICK [sic] was bound over to District Court at that time and his bond was raised the judge to $250,000.00, 10%.

Since the preliminary hearing, other actions have included depositions given by the victim, Meaghan CALLAGHAN, on 15 September 1992, along with her mother, KAREN CALLAGHAN and a deposition given by Ofc. Jeff THEULEN on September 23rd, 1992. There has also been a deposition given by Karen HACKER, a psychotherapist on October 16th, 1992 and three sworn statements have been obtained from Sarah CZAPLEWSKI. Jackie CZAPLEWSKI and their mother, Mary who all live at 4337 Walnut Street. Sarah CZAPLEWSKI is the friend of the victim, whose house the victim was playing at prior to this incident occurring and Jackie CZAPLEWSKI

is the 13 year old sister of Sarah CZAPLEWSKI, who is now stating that she followed the victim home and whose sworn statement is one of the main reasons the County Attorney decided to dismiss the case.

In early December, a press statement was put out by Edward BRODNICKI and his attorney, Lawrence WHELAN, and it was very critical of the actions of the Omaha Police Department and the County Attorney's Office and an article appeared in the Omaha World Herald newspaper on December 12th, 1992 as result of this press release.

In the press release put out by Edward BRODNICKI, there were several specific criticisms of the Police Division and the actions we took on this case. I would like to highlight what some of those criticisms were and respond to them.

1. On page one of the press statement BRODNICKI states, "I was held for two days by the police, who questioned me over and over, trying to pressure me into confessing to a crime I did not commit, even though I repeatedly told them of my innocence." BRODNICKI continued to state he was deprived of any contact with his family. BRODNICKI was talked to at Central Station first by Ofc. John SWANSON of the Robbery/Sex Unit, who interviewed BRODNICKI at 1939 hours. During this interview, BRODNICKI denied his involvement in this incident with Ofc. SWANSON. He gave a chronological chain of events as to where he was at during that day. His statement confirms that during the time period of this incident was to have occurred, he was at home alone. BRODNICKI was offered a polygraph exam by Ofc.

SWANSON, which he refused. However, after he learned he was going to be booked for the incident, be then stated he would take the polygraph. However, he was not allowed to have a polygraph, because he had already requested to speak to an attorney. This entire interview was ended at 2010 hours, which was a grand total of 31 minutes.

BRODNICKI was talked to once the next day by Ofc. Mike HOCH on 18 March 1992 at 1330 hours. This interview lasted less than one and a half hours. Ofc. HOCH has advised that he offered BRODNICKI a polygraph numerous times and BRODNICKI refused to take a test. BRODNICKI made no admissions to Ofc. HOCH during this interview. BRODNICKI was talked to for no more than approximately two hours over the day and a half that he was at Central Station.

Further, BRODNICKI never had a phone hold placed on his phone and was not deprived of any contact with his family and family members could have come to Central Station on the 18th of March during regular visitation hours and visited BRODNICKI.

2. On page two of the press statement, BRODNICKI states that the child supplied a rough description of her alleged captor to the police, which did not coincide with his physical description and the police never attempted to reconcile these discrepancies. The description provided by the victim was that BRODNICKI was a white male in his thirties, 5'11", 220 lbs., wearing sunglasses, had dirty blonde hair, a moustache and a black hat, wearing a black shirt. The victim also provided a complete description of

the vehicle, including license plate number. This information was provided to Ofc. Jeff THEULEN by the victim at her residence prior to THEULEN taking the victim to the suspect's house. It is true, this physical description is not an exact match with Edward BRODNICKI. However, I do not feel the description is off so much that it should have caused the officers to doubt the information being provided by the victim. It is especially true since the vehicle description the victim gave was right on and that the identification was backed up by the victim being shown the suspect in person and saying positively that this was the person that had talked to her from his vehicle and attempted to get her to get into his vehicle. One interesting note: *BRODNICKI states himself in the press release that at first the evidence against him looked strong and that the victim was extremely convincing.*

3. Two other statements made on page two of the press release are that BRODNICKI'S neighbor's if interviewed would have been able to confirm that he never left his house and also that his car engine was found cold by the police. Police officers did not interview any neighbors at the scene of this incident. However, this incident happened within two blocks of the suspect's residence and happened during a very short time frame. In order for a neighbor's testimony to have been influential in this case, a neighbor would have had to been able to say that they were watching BRODNICKI'S vehicle non-stop over the time period the incident occurred and I do not feel that is reasonable. Further, the information on the car engine being cold is also not that influential. It is true the officers felt the hood of the car. However, the engine itself was not checked and once again with this incident happening

only a couple of blocks from the suspect's residence, the suspect could conceivably have driven from his residence, made the confrontation to the victim and driven back to his residence all in a matter of minutes and considering the time of year and the short duration the vehicle would have been running, it would not be inconsistent for the hood of the car to in fact be cold thirty minutes after the incident occurred.

The information on this page about the child having a history of telling tall tales and watching a television program called "The Commish" and also her possible false allegation of the suspect confronting her on June 15th is all information that was discovered well after the police investigation was complete and none of this information was made available to the Police Division to my knowledge.

4. One specific allegation on page two indicates that after the June 15th incident, there was no attempt made by the police or the prosecution to determine the validity of the child's statement about the suspect's actions on that date. To my knowledge, this allegation was never made available to the Police Division and if it would have been, we would have investigated it and attempted to determine the validity of it.

5. On page three of the press statement, BRODNICKI indicates that police did nothing to investigate his alibi and that they did not talk to neighbors and did not investigate the alleged victim's story. BRODNICKI did not really have an alibi that could have covered the time frame during which this incident occurred. There is nothing documented that indicated BRODNICKI made any

suggestion to police officers at the crime scene that they talk to neighbors. As earlier stated, unless a neighbor was watching his car and had it under constant surveillance, I do not see where they would be able to provide an alibi for BRODNICKI. As for interviewing the two children, whom the victim had played with prior to the incident, the entire incident took place after the victim left those children's residence. The officers did not anticipate that there would be any benefit in going back and talking to persons, whom the victim had been with prior to the incident occurring, since that would involve information before the fact. In hindsight, I can see where it would have been beneficial to go back and perhaps talk to the friends, whose house the victim had just left. However, the officers had no reason to doubt the legitimacy of the victim's story. Their opinion was that the victim was very conscientious and seemed to be very truthful in the information she was providing. I would like to point out that the 13 year old witness, who has been identified as Jackie CZAPLEWSKI was not at the preliminary hearing testifying on the suspect's behalf and more importantly, none of the suspect's neighbors, who no doubt had to find out about the incident, were at the preliminary hearing to testify on the suspect's behalf.

The rest of the press statement is being critical of steps that took place after the Police Department's initial involvement. After the suspect was booked and the final interview was done on the 18th, the Police Division to my knowledge, had no further involvement in this case, nor were there any requests made by the County Attorney's Office to do any further follow-up on the case. A lot of

the information that came up after the police investigation is included in some of the depositions I have attached to this memo. This information was never provided to the Police Division.

6. On page four of the press release, BRODNICKI indicates that normally a crime victim is required by the police to take a polygraph test to prove their testimony and that the police did not use a polygraph on the alleged victim because of her age. This is absolutely false and in fact it would be the exception, not the rule, to give a victim of a crime a polygraph test. We do do this. However, we had no reason to doubt the information being given by the victim and I think that with parental permission, the victim could have been polygraphed if officers felt there was a need to do this. I would again point out that much of the information that does call into question the victim's honesty all came out after the Police division was no longer involved in the case.

Some additional notes of interest in this case include: I talked to Ofc. Kevin DONLAN in regards to this situation, who advised he thought that Mr. BRODNICKI acted very unusual at the scene and that he did not at all act concerned about why the officers were there and voluntarily came to Central and never once asked any questions as to the allegations made about him or as to why was being taken downtown. Further, Ofc. DONLAN said Mr. BRODNICKI never made any mention of neighbors at the scene, or that he felt they would be able to provide an alibi for him. Both Ofc. SWANSON and Ofc. HOCH said that in all their years of experience in investigating these types of cases and interviewing suspects, they both felt

that Edward BRODNICKI showed every sign of deception they've seen in terms of his body language during his interviews. They said he gave extremely weak denials and did not give them the reactions you would normally expect an innocent person to give. Also, I would restate how Mr. BRODNICKI was offered a polygraph both by Ofc. SWANSON and by Ofc. HOCH the following day and refused to take the polygraph test.

None of Mr. BRODNICKI'S neighbors ever contacted the Police Department anytime during this investigation to provide him an alibi, nor did they came to court and testify in his behalf.

My final assessment on this matter is that the investigation conducted by both the uniform officers and the criminal investigators was conducted in a professional and a sincere manner. I did not review any evidence that indicated any of these officers were lax in their responsibility to do a thorough investigation. I would agree that after reading the depositions given by the victim and also the preliminary hearing transcripts and finding out about the apparent false information given by the victim on June 16th, this would have prompted some further investigation by the Police Division. However, we were never made aware of any of these facts to my knowledge. There were some inconsistencies in the victim's statement, both in the deposition and in the preliminary hearing, which does cause me some concern as to the victim's honesty. However, I have discussed this issue with Linda SENFF, who states that the victim was brought back into the County Attorney's Office and reinterviewed and the victim still stands by her original information.

This case was reviewed by the County Attorney, who found the investigation to be acceptable and it was reviewed at the preliminary hearing by a judge, who found the information to be sufficient to bind the case over to the District Court and even to raise the bond of the suspect. At this time, I do not see any benefit in responding back to the news media as to the criticisms brought up by Edward BRODNICKI in his press release, unless we are forced to do so, or unless further questions come up about it. Regardless of whether Mr. BRODNICKI is guilty or not guilty of this incident, the fact of the matter is he was never found guilty in court and the system did work in that he was allowed to have an attorney, to have a court hearing and to ultimately be able to bring forward additional information that calls into question the validity of the complaint made by the victim, which ultimately led to the County Attorney dismissing the charges. If Edward BRODNICKI was completely innocent of any wrong doing in this incident, then it is unfortunate that he had to be put through some hardship on the case, but that's the way our system is designed and for the good of everyone, it's a risk that we all take. I would reiterate that I do not see any significant problem with the investigation conducted by the Police Division on this case. However, I will certainly use this case as an example in future discussions with investigators and sergeants as to the importance of taking every reasonable investigative step to obtain corroboration and to eliminate any doubts that could arrise [sic] in a particular victim's version of what happened, especially if that victim is a juvenile.

Please advise if you want any further analysis or information in regards to this situation. Once again, I have attached all the reports to this memo, as well as a map of the area where this incident occurred, where I indicate on the map where the victim's friend resides at, there the victim resides at and where the suspect resides at, to illustrate where the contacts were alleged to have taken place.

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(2)

Supreme Court, U.S.
FILED
AUG 22 1996
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No. 96-129

In The

Supreme Court of the United States

October Term, 1995

EDWARD BRODNICKI,

Petitioner,

vs.

CITY OF OMAHA, NEBRASKA, A Municipal Corporation, COUNTY OF DOUGLAS, a Nebraska Political Subdivision, PATRICK A. McCASLIN, KEVIN DONLAN, JEFFERY J. THEULEN, JOHN SKANES, JOHN SWANSON, MICHAEL HOCH, and JAMES JANSEN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nebraska

RESPONDENTS' BRIEF IN OPPOSITION

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6 pp

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents City of Omaha, Patrick A. McCaslin, Kevin Donlan, Jeffery J. Theulen, John Skanes, John Swanson and Michael Hoch request that this Court deny the petition for writ of certiorari seeking review of an opinion of the Eighth Circuit Court of Appeals reprinted in the petition for certiorari at Appendix 1 through 15.

STATUTE INVOLVED

28 U.S.C. §1254 (1)

RULES INVOLVED

Rule 10(a) of the Rules of the Supreme Court of the United States

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

The Petitioner filed a civil rights action under 42 U.S.C. §1983 on March 17, 1992, alleging that he was arrested by the Respondent Omaha police officers without probable cause. By order entered January 25, 1995, United States District Court Judge Lyle Strom granted summary judgment to the individual Omaha police officers. Although the motion before the court at that time

contended that the officers were protected by qualified immunity, the court decided the motion by finding that probable cause existed. The immunity issue was left unresolved. On February 24, 1995, Judge Strom entered summary judgment on behalf of the City of Omaha. Again, Judge Strom found that probable cause supported plaintiff's arrest. On January 31, 1996, the Eighth Circuit Court of Appeals entered an order affirming the District Court's order granting summary judgment.

B. Correction of Misstatements in the Petition.

The opinion of the Court of Appeals correctly sets forth the facts of this case and the Respondents respectfully direct the Court's attention to the appellate court's opinion reprinted in the petition for certiorari at Appendix 1 through 15.

Pursuant to United States Court Rule 15.2 Respondents direct the Court's attention to the following misstatements of facts in the Petition:

On page 8 of the Petition, the Petitioner states that the only fact given by the alleged victim to the officers that was consistent with the alleged victim's statement was the license number of the Petitioner's car. Further, Petitioner consistently refers to the "show-up" as unduly suggestive, thus inferring that the appellate court determined the show-up was inappropriate, but not actionable. However, the Court of Appeals observed in its opinion:

> " . . . She [the alleged victim] gave the police a specific description of the car, its license plate

> number, and a detailed account of the incident. . . . Callaghan's [the alleged victim's] mother made statements to the officers attesting to her daughter's truthfulness. Callaghan identified Brodnicki in a show-up. Upon this evidence, a reasonable police officer could conclude that probable cause existed to arrest Brodnicki." (Petition Appendix, p. App. 6)

REASONS FOR DENYING WRIT

Rule 10(a) of Rules of the Supreme Court of the United States suggests that the Court decline to exercise discretion to grant a petition for a writ of certiorari unless, among other things,

> "(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important issue . . . ; or, has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> * * *
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court"

As the result of Petitioner's repeated mischaracterization of the "show-up" identification procedure in the instant case as "unduly suggestive" and his inference that

the "show-up" procedure was the sole factor upon which the lower courts found probable cause, the Petitioner has identified a question, to wit: "When does an identification procedure violate due process under the Fourth, Fifth and Fourteenth Amendments?" that was not a deciding factor in the lower courts' resolution of the issues in the instant case. The issue decided by those courts was whether the Respondents had probable cause to arrest Brodnicki. (District Court Memorandum Opinion and Order, Petition Appendix, p. App. 24, Eighth Circuit Opinion, Petition Appendix, p. App. 3). The identification procedure initiated in the form of a "show-up" and specifically determined by both lower courts to be appropriate, was only one minor factor in the lower courts' determination of the existence of probable cause. Once the Court found that the individual officers did not violate the Petitioner's constitutional rights, the lower courts determined that the Petitioner could not press a claim against the City of Omaha under the theory of inadequate training or municipal custom citing *Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), *Reynolds v. Little Rock*, 893 F.2d 1004, 1007 (8th Cir. 1990), *cert. denied*, 501 U.S. 1204 (1991) and *Abbot v. Crocker*, 30 F.3d 994, 998 (8th Cir. 1994). (Petition Appendix, pp. 9 and 17)

The Petitioner has not identified any action by the lower courts that would, in this case, justify granting a writ of certiorari.

CONCLUSION

The Petition for certiorari should be denied.

Respectfully submitted,

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Supreme Court
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No. 96-129

In The

Supreme Court of the United States

October Term, 1995

EDWARD BRODNICKI,

Petitioner,

vs.

CITY OF OMAHA, NEBRASKA, a Municipal Corporation, COUNTY OF DOUGLAS, a Nebraska Political Subdivision, PATRICK A. McCASLIN, KEVIN DONLAN, JEFFERY J. THEULEN, JOHN SKANES, JOHN SWANSON, MICHAEL HOCH, and JAMES JANSEN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS COUNTY OF DOUGLAS AND JAMES JANSEN IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioner has presented two issues for review, only one of which relates to Respondent James Jansen.

Petitioner claims that the County Attorney lost the protection of absolute immunity when he assigned the trial to a deputy and, therefore, was not immune from suit when he reviewed the case for dismissal.

Pursuant to Sup. Ct. R. 15, Respondent James Jansen notes that Petitioner has not stated the facts of the case in a manner sufficient for Respondent to enter an objection to their accuracy at this time. Although Petitioner states he was prosecuted by the County Attorney, it should be noted that charges were dismissed prior to trial.

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OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In an unpublished Memorandum Opinion entered July 7, 1994, the Honorable Lyle E. Strom, then Chief United States District Judge for the District of Nebraska, granted Respondent Douglas County and Respondent James Jansen's Motion for Summary Judgment. Following the granting of summary judgment for the remaining Respondents, the entire matter was dismissed by the District Court. *Brodnicki v. City of Omaha*, 874 F.Supp. 1006 (D. Neb. 1995).

Petitioner filed a notice of appeal and, upon presentation of briefs and oral argument, the Eighth Circuit Court of Appeals affirmed the decision of the District Court. *Brodnicki v. City of Omaha*, 75 F.3d 1261 (8th Cir. 1996).

The decision dismissing Respondent Douglas County was not challenged before the Eighth Circuit Court of Appeals. Respondent James Jansen acknowledges the jurisdiction of this Court to review the Petition for Writ of Certiorari and does not dispute Petitioner's statement of statutes involved.

STATEMENT OF THE CASE

In March, 1992, Edward Brodnicki was arrested for the attempted kidnapping of a nine-year-old girl. Following a preliminary hearing, Brodnicki was bound over for trial and released on bond. Several months later, investigators hired by Brodnicki brought information to the

County Attorney who, upon confirming this information, dismissed the charges.

The action against Respondents Jansen and Douglas County, brought under 42 U.S.C. §1983, alleged Jansen violated Petitioner's due process rights by prosecuting him for attempted kidnapping and that Jansen's actions were taken pursuant to the policies and practices of Douglas County. A Motion for Summary Judgment was filed on October 5, 1993, on behalf of Jansen and Douglas County. The District Court found Jansen, in his role as County Attorney, entitled to absolute immunity for his actions. The Court further found no basis for liability on the part of Douglas County. Both Jansen and Douglas County were dismissed upon the filing of the Memorandum Opinion and Order on June 13, 1994. Following the granting of motions for summary judgment in favor of the named Omaha Police Officers and the City of Omaha, the case was dismissed on February 24, 1995.

The District Court decisions were appealed to the Eighth Circuit. On January 31, 1996, the Eighth Circuit affirmed the District Court's decision. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on March 25, 1996.

Petitioner now seeks review of this Court on the issue of whether or not Respondent Jansen's actions as County Attorney fell outside the protection of absolute immunity.

STATEMENT OF FACTS

The facts pertaining to Respondent Jansen are undisputed. On March 17, 1992, Petitioner was arrested by the City of Omaha police officers for the attempted kidnapping of a nine-year-old girl. On or about March 18, 1992, Douglas County Attorney James S. Jansen, Deputy County Attorney Linda Caster-Senff, and Chief Deputy County Attorney Donald W. Kleine reviewed the matter and police reports and charged Brodnicki with attempted kidnapping in violation on Neb. Rev. Stat. §28-313(1) 1943 (Reissue 1989). On March 19, 1992, a criminal complaint was filed against Brodnicki. A preliminary hearing was held on April 7, 1992, in which Brodnicki cross-examined the State's witnesses. He declined an opportunity to present evidence. At the conclusion of the hearing, probable cause was found and Brodnicki was bound over for trial and released on bond.

On or about April 17, 1992, Petitioner's counsel contacted Respondent to discuss the results of a polygraph examination that was conducted at the request of and by the Petitioner. Neither Jansen nor any of his staff participated in the polygraph examination.

On or about June 16, 1992, a Motion for a review of the Petitioner's bond was filed. A hearing was held on that Motion June 18, 1992. At that time, the Petitioner informed the prosecutor that he intended to call seven witnesses. The Court continued the revocation hearing. Following this initial hearing, an investigator for the prosecutor interviewed the Petitioner's prospective witnesses. Subsequent to these interviews, the prosecutor withdrew the Motion to revoke the Petitioner's bond.

The criminal trial of the Petitioner was scheduled to commence on October 19, 1992. On or about October 15, 1992, the Petitioner identified to the prosecutor thirty potential witnesses. On October 19, 1992, the Court sustained a Motion to continue the trial and to set another pretrial conference for November 16, 1992. On or about November 12, 1992, Brodnicki provided the prosecutor with photocopies of Affidavits of three of his potential witnesses who were expected to provide exculpatory testimony. Subsequently, the prosecutor met with the prospective witnesses and reviewed their statements. Additionally, the prosecutor met with the complaining victim and her parents and, as a result of these meetings, sought and obtained dismissal of the criminal charges against Brodnicki.

On March 16, 1993, Petitioner filed suit in the United States District Court which was dismissed following granting of motions for summary judgment in favor of all Respondents. On February 24, 1995, Respondent Jansen was specifically found to have absolute immunity.

The summary judgment decisions were affirmed by the Eighth Circuit Court of Appeals and Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc denied. No issues were raised at this level relating to the role of Respondent County of Douglas.

Petitioner centered his appeal around specific actions of Respondent Jansen and asserted that in obtaining, reviewing, and evaluating evidence in preparation of this matter for prosecution, Respondent Jansen had shed the

cloak of absolute immunity his role as advocate for the state affords him.

ARGUMENT

The Petition for Writ of Certiorari should be denied as there is no compelling reason for this Court to reconsider the well-settled issue of absolute immunity. Both the District Court and the Appellate Court decisions were based solidly on relevant decisions of this Court, and neither decision conflicts with prior decisions on this important issue.

Petitioner suggests this Court needs to design a bright line rule more fully identifying which actions of a prosecutor are protected by absolute immunity. The functional approach that this Court has taken serves to create just such a line without burdening the judicial system with the task of micro-managing the individual prosecutorial activities.

The functional approach adopted by this Court looks to the nature of the function performed by the prosecutor. *Buckley v. Fitzsimmons*, 113 S.Ct. 2606 (1993). When acting as an advocate for the state, the prosecutor is entitled to the protections of absolute immunity. *Id.*, at 2615. A prosecuting attorney is required to constantly, in the course of his duties as an advocate for the state, make decisions on a wide variety of sensitive issues including questions of whether to file an Information, whether and when to prosecute, and whether to dismiss a criminal action. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

Petitioner asserts that Jansen's review of polygraph reports and meetings with Brodnicki's defense counsel were purely administrative. It is undisputed that Petitioner's counsel brought the polygraph to the prosecutor for his review after probable cause had been determined and Brodnicki had been bound over for trial. As an advocate for the State, the prosecutor had an obligation to review any and all exculpatory evidence presented to him, even if such evidence would be inadmissible in court. *Id.*

Petitioner further asserts that because Jansen delegated the reponsibility for the prosecution of this case to his deputies, his role was merely administrative.

> At oral argument, Brodnicki's counsel conceded that the primary reason he went to Jansen with the polygraph results was to persuade Jansen to dismiss the charges. In short, counsel asked Jansen to exercise his professional judgment and Jansen did so, although not with the immediate result counsel wished.

Brodnicki v. City of Omaha, 75 F.3d 1261 (8th Cir. 1996), at 1267.

By requesting that Jansen personally meet with his counsel and review polygraph reports, Brodnicki recognized Jansen's discretionary ability to determine whether or not this criminal case would proceed. There is no need for this Court to review the function of Jansen's activities when Petitioner has made such an admission.

It is essential to the proper functioning in the criminal justice system that the County Attorney, even though he has assigned a deputy to take the case to trial, be able

to perform those functions necessary to determine whether or not to take a case forward to trial or to dismiss the action.

If the prosecutor were not entitled to absolute immunity for performing the acts complained of by Petitioner, the potential for liability could prevent the vigorous and fearless performance of the prosecutor's duty.

The safeguard to potential "corruption" of the prosecutor's office lies not in the articulation of bright line rules by this Court but within the democratic process itself. The public body has the power to elect a county attorney in whom they have full confidence and trust.

CONCLUSION

Neither the decision of the District Court nor the Court of Appeals departed from the usual and standard course of judicial proceedings so as to justify this Court's exercise of its discretionary power of review. Rather, they comport in all respects with the standards that this Court has previously and consistently adopted.

Respondent James Jansen respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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